

EUNOMUS:

OR,

DIALOGUES

CONCERNING THE

LAW AND CONSTITUTION

OF

ENGLAND.

WITH

AN ESSAY ON DIALOGUE.

VOLUME THE THIRD.

L O N D O N:

Printed in the Year MDCCCLXVIII.

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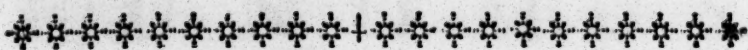
WITH

An Essay on Dialogues.

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Printed by the King's Printer.



E U N O M U S.

D I A L O G U E III.

Il y a une nation dans le monde qui a pour objet direct de sa Constitution la Liberté politique. Nous allons examiner les principes sur lesquels elle la fonde. Si ils sont, la Liberté y paroîtra comme dans un miroir.

ESPRIT DES LOIX, l. 11. c. 5.



E U N O M U S.

D I A L O G U E I I I.

Il y a une autre chose à nous dire à tout point
de vue. C'est que le monde est en mouvement. Nous
allons examiner les principes qui le dirigent. Ils le
font. Ils le font la même y parviens comme dans
un instant.

Il y a une autre chose à nous dire à tout point.

EUNOMUS.

DIALOGUE III.

§ 1. **I**T was late in the evening before Policrites returned with Eunomus from the visit proposed. What with seeing the improvements their neighbour had made in his walks, and what with the variety of conversation within doors, the time passed away insensibly; and it was late enough for Policrites to be at home at a time when he had not set out for it. In these circumstances Eunomus, who was never better pleased than when the convenience of his Friends gave him an opportunity of obliging them, easily prevailed with him to stay at his house that night: Particularly as he

was every minute expecting a friend on a visit to him for a few days, who was very lately returned from abroad after three years absence; and who had sufficiently gleaned the curiosities of Italy, during his stay there, to be entertaining in the description of his travels.

Before Policrites could well accept of the invitation made by Eunomus, Philander (for that was the stranger's name) appeared in the court-yard. The eagerness of communicating and hearing accounts of persons and places filled up the conversation during the remainder of that evening; and by the aid of fancy and description they visited the Grotto of Paufilippo, Virgil's Tomb, Mount Vesuvius, and many other curiosities formed by Nature and Art, or consecrated by story. The next morning when the tea-

DIALOGUE III. 5

tea-table was removed, the conversation grew a little more sedate and methodical. They began to consider the inhabitants as well as the cities : and did not pass immediately from Naples to Rome ; or talk of the Alps and their various Republics, without remarks on the peculiarities of their manners, laws, and governments.

Eunomus and Policrites, who had never been abroad themselves, could have had very little share in a conversation of this kind, if they had not relieved the fatigue Philander must have undergone from a continued narrative, by intermixing reflections on what they heard, with the same freedom as they occurred.

And tho' they at first intended nothing more than to pass thro' Italy by Philander's assistance, yet by a natural progress of thought, like the travel-

ling of Homer's Deities*, they made an easy transition from Italy into Greece; and from the most distant Parts of the East, to the extremities of Denmark or Russia: And from some observations advanced on one side, and questioned on the other, they were insensibly led to a more serious contemplation of Government in general, and that of their own Constitution in particular.

It was that part of the conversation that is here transcribed. I do not exactly remember, what circumstances introduced it, but think it was something in this manner.

I am glad however, (says Eunomus, addressing himself to Philander) your old climate agrees so well with you; and as health is the principal ingredient of happiness, I hope you will

* Il. 15. v. 80.

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not permit the reflection of your past amusements in other Countries, to break in upon your content at home.

PHILANDER.

I can assure you the reflection upon what I have seen abroad, will upon the whole greatly add to, rather than diminish, my happiness in my present situation. He travels to very little purpose, who brings home only uneasiness at being there; and if England is his home, in my opinion, he closes his remarks with as little judgment as candour, who concludes his description of what he has seen elsewhere, with wishes that he had never left the countries he has described.

EUNOMUS.

You seem to express yourself “with an heart so entirely English,” that I

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am apt to think you do so, rather to flatter your present company, who have never left this little corner of the globe ; at least a preference of this kind, was it to come from us (who have made no comparifon) might with reason be deemed no better than partiality. There have not been wanting those, and those who have been travellers and had more right to decide, who have allowed it even no natural production of its own. Some (I think) allow us the honour of nothing but hips and haws, crabs or blackberries. More agree that our policy, manners, and arts, are either still in many respects in a state of barbarism, or imported from the happier growth of other countries : as if even the conveniences or necessaries of life, were as far from perfection in this country, as the Sun is from being vertical ; or

DIALOGUE III. 9

the “longos nocte Britannos” was still applicable in more senses than one.

PHILANDER.

With more justice (I will venture to assert) England deserves to be remembered among the happiest spots, if it is too much to prefer it; and I will assert this, both as to its climate and manners. Addison, who would spend his Winters in the South of France, and his Springs in Italy, prefers the Summers of England: Bishop Berkeley, who is enraptured with the vertú, nay with the fruits of Italy, allows he saw no verdure like that of the fields of England: And that lively monarch, who said so many good things, chose no bad topic to recommend his own climate, when he said, “that was the best, where he could
“ be abroad in the air with pleasure
“ the

“ the most days of the year, and the
“ most hours of the day.” You see I
have built upon your concession, perhaps
more than you intended; when, because
you gave some authority to travellers,
I have drawn all my arguments from
them. Indeed, whether you was in
earnest or not, I cannot help thinking
competent judges, who have lived in
more climates than their own, are more
to be credited not only than those who
have been confined at home all their
days, but (what is most intolerable)
than those who would put on them the
magisterial air of having seen the
world, without any one qualification
for the purpose; who have visited fo-
reign countries with an entire ignorance
even of the natural face and produc-
tions of their own, much more its
Government and Constitution: Can
they, to men of sense, be more ridicu-
lous

DIALOGUE III. 11

lous than he would be, who travelled only in his study, and yet would undertake to describe every step from the Via Appia to any Roman Villa, without so much as knowing where the Parliament meet, or the Tower of London stands ?

I will not absolutely deny, but that it may, in works of art, be the genius of Englishmen to imitate rather than invent; but then, what they imitate, it is allowed they generally improve. And so, as to our soil, those plants thrive well here, that had their birth in other countries. It is much the same, I suppose, in the great affair of Government and Constitution ; and if England from the various intermixture of foreign nations in the early part of its history, has imported the Saxon Feudal, and other principles of Law or Policy, time has at length so wove them together,

gether, that England may challenge the world to produce the like elsewhere. I am sure, if you could give up that fancied happiness, or that amiable enthusiasm (as I will allow it to be) of visiting places famous by tradition ; those are much happier in other respects, who never leave England. For my own part, and it is from experience I speak, I do not think a visit to the Tusculan, or Virgil's tomb, at all more rational or satisfactory than the ridiculous fashion, some centuries past, of making a pilgrimage to Palestine. Besides you have enough to admire as to fame or antiquity in your own island : View the spot where Cæsar landed, or trace Antonine through England ; or without going so far back for your entertainment, review those places renowned as the scenes of the most shining periods in our
his-

history ; go and idolize Liberty where Magna Charta was passed ; or raise in your own mind the departed pomp and magnificence that the palaces, the monasteries, or tilts and tournaments of ancient times, have made so many places remembered for. All these you may view without the hazard of travelling into foreign countries : Foreign countries you may visit without hazard in description. Ballancing all my adventures together, I had rather have read Addison by my fire-side, than have travelled with him in my Pocket ; much more would I chuse to hear Shaw's account of his travels, than compare the justness of his accounts in the desarts of Arabia. As to the forms of government, I have seen enough to know they are very imperfect elsewhere ; I am very happy in the experience of our own, and only wish I knew more of it.

POLI-

POLICRITES.

I should have thought a habit of rambling, like all other habits, would have produced a fondness for itself: and that Philander would have had a great contempt for the kind of vegetable life of us who are fixed to a Profession, and are obliged to spring up, flourish, and decay in the precise spot that nature or custom has placed us in. And rather than a panegyrick on *home*, I should almost have expected from a traveller the imprecation of the Tartars on any one who talked of a settled home. Those Erratic tribes (it is said) have so little idea of settling, that when they are angry with any one, “*they wish he may live in one place, and work like a Russian.*” But tho’ we are obliged to Philander for making us easy by uniting home and happiness,
I can

I can not altogether concur with him in condemning all Europe in a lump, as he seems to have done ; nor am I in the least able to judge of the advantage our own has on the comparison, unless I knew in what points different States were compared.

PHILANDER.

§ 4. No minute detail in the one case, or exact comparison in the other, is wanting to decide this point. I think, the most general ideas of government will shew us, that those in the first case are not greatly to be admired, because most of them fall at least much below our notions of good government ; and the most general description (if it be but true) of our own, will, I am apt to imagine, as best corresponding to our ideas of good government, shew the preference I hinted

hinted was not very extravagant or ill-founded. Nor would I decline in proof of my assertion, an undertaking, which perhaps would give us all some trouble; myself in stating what I take this idea of good Government to consist in, and you in attending to me; if Eunomus will engage in the most laborious part of the work, by giving us a general sketch of our own Constitution: after which it will be very easy to see, whether I was right in the notion I advanced.

EUNOMUS.

I shall very readily submit, without any apology, to the terms you have prescribed; I think the subject so interesting, that it cannot be considered out of time: and if we do not do it justice now, we shall leave more to be said another time; so that
the

DIALOGUE III. 17

the sooner Philander begins the better.

PHILANDER.

§ 5. From the tenor of my proposals, and the broken precipitate manner in which I take up this subject, you will neither of you expect a nice sketch of any government in particular; much less that I should make use even of my own observations so far as to apply them to the interests of our own Country. This I own is a province politicians should extend to the utmost; but the measures necessary in the cabinet, would be ill-timed in conversation. The real power and strength of all states is comparative, and must therefore depend upon a view of others as well as themselves: But we are not now planning conquests, or defending ourselves from invasions.

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The internal strength of a State is what I am to consider ; what characterises it as a civil society, and what is principally its own : may I explain myself in two words, by saying it is the “ moral character ” of a state that is now before us ?

§ 6. The best original of society that has been given us, is that of compact ; it in reality is the only one, that corresponds with the condition of men before the existence of society ; and is the only reasonable account of men’s ever quitting that condition. Men, independent of society, are naturally equal ; their rights are exactly the same : in a genuine state of nature, power and subjection, except in particular cases, do not exist.

Power or authority that exists in a state of nature, must be either usurped, or lawfully acquired. No usurpation,
or

or unjust force, which *ex vi termini* is an invasion of natural right, can be the just origin of civil society.

Power or authority to be acquired justly in a state of nature, may be such as parents have over their children for special purposes ; but which, being temporary and limited, can never be the origin of that extensive subjection necessary to government : and indeed has this fundamental defect, that it supposes Men to be Children all their lives, and to live all in one family. Those who have amiably pictured a King as the Father of his People, or compared a Kingdom to a great Family, meant it, I am persuaded, with quite other views : They aimed at recommending parental affection in the Head ; and spontaneous filial duty, in opposition to coercive obedience, in the members of society, to confirm

the union ; by no means to have pointed out parental authority as the origin of that union. I would have left Sir Robert Filmer in quiet possession of so unwarrantable a conceit, if I had not found Sir W. Temple in some measure of his party. I will only add, with a view to this last writer, that error is often inconsistent ; and when that agreeable author once departed from just solid principles, no wonder he would unawares recur to better notions, and make one part of his essay a contradiction to another.

Another way indeed of acquiring just Power over another in a state of nature, is when one man by his criminal conduct has forfeited his liberty, or perhaps his life, to the person injured. This is the the true just origin of slavery. But admitting, the injury was to go in succession ; and
5 that

that the children of the aggressor were born slaves to the party injured; slavery itself (I suppose the worst writers would allow) differs so much from civil subjection; and the slaves or subjects, in such cases, would be so few, that there could be no pretence of founding society on this kind of authority.

If then men in a state of nature, that is, persons who are neither children nor slaves, are equal and independent, how is it possible for that equality and independency to be abridged in forming any plan of civil subjection, but by their own free voluntary consent?

§ 7. After this view of society, it will be in vain to argue, that no such commencement of government in fact can be found of all those that have or do exist;—that, not to mention absolute Governments, which (it will be

said) are directly in the teeth of this way of arguing, there are whole nations of slaves who have yet their Chiefs, their Kings, and their Warriors.

I say it will be in vain to use such arguments, because they neither conclude any thing, nor apply to the case. As to those who deny any such actual commencement of society, as that of compact, and yet would appeal to fact in support of the opposite assertion, I shall only say this by way of answer :—'Till any one fact is advanced on their side, to countenance a notion so contrary to reason, I beg reason may stand its ground. It may be difficult to say from history what was the particular commencement of any government or state whatever ; I believe it will be more difficult to find

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find any thing like a civil state commencing by force.

To make tyranny the parent of society, is too bold a fiction even for the poets. Shakespear, in an incident of this kind, has mixed (as he always does) a much greater justness of thinking with admirable humour and invention. He represents the sailor Stephano, in the *Tempest*^a, *forming a kingdom by consent* of the majority, tho' he supposed but five persons in the island. Speaking to Caliban of Prospero he says,

“ *Steph.* Monster, I will kill this man : his
“ daughter and I, will be king and queen, save
“ our graces ! and *Trinculo* and thyself shall be
“ vice-roys. Dost thou like the plot, *Trin-*
“ *culo* ?

“ *Trin.* Excellent. *Stephano*, give me thy
“ hand.”

^a Act 3. Scene 2.

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Then

Then in the fourth act*, we find the government is all settled, and peaceable subjection has taken place. The monster says,

— “Prithee, my king, be quiet.”

And his other subject says,

“O king *Stephano* ! O peer ! O worthy *Ste-*

phano !”

So that instead of the strange origin of government some writers pretend, Shakespear had more propriety than to let even his Monster be governed but by his own consent.

If however such writers tell us, absolute governments kept up by force, are well known even at this day, and yet are a greater paradox ; if the rise of political union is to be deduced from consent alone, May we not say, the same experience from whence they collect such instances, will go a great

* Scene 5.

way in refuting them? Many Governments are in fact administered often more by tyranny than by Law: But what proof is the actual administration of Government so different at different times of its original? Let me add, that even these, whether European or Asiatic, are rarely without some kind of Laws. Now every Law observed is a negative on absolute power: because (as a wise ancient observed) every Law is a kind of compact, and a security of some right; and obedience to Laws is of itself strong evidence of consent.

Let me add too, the frequent revolutions in such countries may, in one view, be considered as evidence of Government in general being properly founded on consent alone: because they are the strongest marks of public disapprobation that can be given of
any

any Government's abusing natural Liberty; which men never intended to give up, by forming Societies, but to put into better hands. In Governments less absolute, the least imaginable share the people have in making Laws are new proofs of a contract. Are then those innumerable clans of wild Arabs, and untutored Indians, that people the vast deserts of Africa and America, to be complimented with the name of Societies, merely to refute a system, to which they are the only exceptions? or indeed, as far as they have any union, are they properly exceptions to this great origin of Society? Even those uncivilized tribes, in their common intercourse have their Councils, their Debates, and their formal Alliances with one another. All these are the very language of consent;

lent; and, as it were, so many contracts in the abstract.

This is my idea of Society, or civil Union in general; it will be no difficult matter, without minutely pursuing the several species we meet with in the world, to say which do or do not answer this great end and origin of Society.

§. 8. Prefixe, and other Historians, tell us, Henry the Fourth of France entertained a project of new settling Europe by dividing it into fifteen States: you will think my division perhaps a little more chimerical, when I propose to consider Governments only in two lights, either as Monarchies or popular Governments. The combinations of these with all their shades and differences are infinite. Mr. Locke, I remember, asserts, There is in reality no such form of Government as
absolute

absolute Monarchy; no such original constitution as the arbitrary will of a Prince absolutely independent of Law. That in point of fact, there are Governments where the will of a Prince does at least over-rule all Laws, Mr. Locke would hardly deny. He must be understood to suppose a deviation from a form of Government to be a different thing from the form itself. Montesquieu's whole book is founded on a regard to that difference; and the justness of the observation may be seen by looking one moment at home. You would not I suppose pitch upon the æra of King John, or the milder tyranny of Henry the Eighth, as the true representation of our form of Government: they, upon occasions, exercised the regal power in England as absolute as the Turk himself does.

If

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If indeed there is no such form of Government as an absolute Monarchy; I will venture to add, that of a pure Democracy is altogether as ideal: that no Government could possibly be administered, and consequently could exist, without some delegation of the executive power; or some legislative powers vested in representatives of some sort or other. In proof of this I (in my turn) will appeal to the momentary assemblages of the wildest Arabs ever formed under some Captain. There is scarce a popular insurrection in a State, but what is headed by some chosen leader. I conclude then, as a set of people in forming Society would never give up their Liberty and their Interests to the absolute management of one man; so on the other hand, in order to preserve both with harmony, they must delegate

delegate some trust, some management, if not to a single person, yet to a few. It is the quantity of power that is delegated, and the number of persons to whom it is delegated, that form the proper and most simple view of that great variety of Governments that now exist in fact, or are made to exist in the imagination.

§. 9. Having thus considered the origin of Government in the abstract, and the forms of them in the simplest light that is possible, there are other very interesting questions I could wish to set in agitation, if I did not apprehend them too indeterminate in themselves; certainly too copious for an accidental conversation. I mean, what could in reason or probability (for in fact I have all along supposed it almost impossible) to account for the rise of different forms of Government? How much

DIALOGUE III. 31

much more subtle and refined, tho' far less interesting as being purely speculative, are those questions in Politics, about "the best form of Government," and the possibility "of universal Monarchy?" I can't however help saying a word or two upon these points.

Whether some experience of one person in critical junctures at first occasioned greater command and trust to be given him, and afterwards a confidence to be placed in his descendants in succession, which by degrees might found an hereditary Monarchy; or whether the necessity of entrusting the execution of great enterprizes to the command of a single person; and that trust, recommended by experience, and at length continued in ordinary affairs, might be the parent of Monarchy in general; I leave you to judge:

judge: I shall only add, an elective monarchy, not only as the simplest idea, one must imagine, would obtain in the world before an hereditary monarchy; but monarchy itself seems not to be the first form of Government that society (taking its rise from compact) would naturally fall into. However amiable a form of Government it may be, when qualified as with us; monarchy, in the abstract, is certainly the most remote from the idea of natural equality. For, in the abstract, what can be more opposite than that any set of people, from being all equal in power and authority among themselves, should all unite under the power and authority of a single person? a Democracy, as it has least of the idea of Government in it, seems however to be the first obvious mode of assemblage from a state of nature;

nature ; it is a society indeed that least infringes on natural liberty, but at the same time, least corrects the abuses of it, which is the end and aim of all societies. A kind of limited Republic seems to be the first and most obvious step to a regular subordination, and society, properly so called ; for without subordination, no durable form can subsist : The very name of Government implies it. Besides that the degree of Liberty seems to make a Republic an obvious form of government from a state of nature, when liberty is to be given up : so is it a likely form to be laid hold of, where liberty has been abused under a monarchy ; and that monarchy comes to be dismembered by part of the subjects shaking off their ancient subjection, and forming new assemblages of their own. The states of Holland afford an instance of what I am speaking.

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§. 10.

§. 10. As to the great question about the best form of government, less need to be said of it ; because it is the duty of subjects under any government, to take things as they find them : You will believe me, when I say I would not wish to alter that I live under, if I could. Besides, a perfect government I look upon to be as mere an idea as perfect virtue, or perpetual motion. It is easy enough to have a true general idea of the thing itself, tho' it may never subsist but in idea. It must be "such an one as will diminish least of natural liberty, and at the same time, best answer the end of society." But tho' I will not pretend to decide which is the best form of government of those that now exist, supposing no one to be entirely perfect ; yet I can by no means agree with Mr. Pope when he says, " that
which

DIALOGUE III. 35

which is best administer'd is best^a:"
 The sense commonly affixed to that passage is, that the form itself is indifferent, the goodness consisting merely in the administration. And if that is the sense of it, I no more agree with him in this, than I do in the other part of the parallel. I allow the best religion without a good life, will be of as little service to mankind, as the best government without a good administration; but to resolve the goodness of the first into mere morality, and of the other into mere administration, is what, I believe, as good Protestants or true Englishmen, we cannot so well allow to be a just

^a For forms of government let fools contest;
 Whate'er is best administer'd, is best:
 For modes of faith let graceless zealots fight;
 His can't been wrong, whose life is in the right.

ESSAY ON MAN, 3. v. 303.

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way

way of thinking ; and if I should observe Mr. Pope himself had on another occasion, expressed himself very differently, you will grant, in this instance, that second thoughts may not always be the best : “ I am a catholic, (says he, in one of his letters) in the strictest sense of the word ; if I was born under an absolute prince, I would be a quiet subject ; but I thank God I was not ; I have a due sense of the excellence of the British Constitution.”

But however, to refute, as well as to censure the other notion, let us, without taking notice of mixed forms, suppose as before, that there are only two kind of governments, a monarchy and a popular government. These are founded on principles essentially different ; and they are perfect in their kind, when the administration of them

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D I A L O G U E I I I .

87

is in strict conformity to the principles on which they are founded. Suppose then, in these governments, those in power either equally acted up to these principles, or equally departed from them : are the advantages in the one case, and the inconveniences in the latter, entirely equal ? in the first case, the public good is the general aim, but it is pursued by different means : and is there no preference as to the means ? in the latter, there is a general neglect of the public good ; but may not greater opportunities make that neglect more fatal from one quarter than another ? now this difference of means and of opportunities, if there are such, result, in the case supposed, from the internal principles of the government, and not from the administration : because we have supposed, the conformity to the proper

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E U N O M U S.

principles to be the same in each, and the administration differs only in respect to this conformity.

So that there is some justice due to the question, in fairly stating it ; and a question can then only be fairly stated, when essential circumstances are alone compared ; those that are accidental being neglected. And thus was the present question stated in the early ages of history, when the dispute was of more consequence than it can be in mere speculation. In that memorable debate preserved (if not invented) by Herodotus^a, we must own Darius was fair in his manner of stating the proposition, when he asserted, “ that of the three forms proposed, and each the best of its kind, the best popular government, an oligarchy, or a monarchy, the monarchy was far preferable.” I, who will not pretend to

^a Lib. 3. §. 82. Edit. Gale.

decide

decide on this point, shall say nothing more upon this subject, than remind you of the whole passage at length, a master-piece of its kind, and which seems to comprehend all the arguments others have since used on that important subject.

§ 11. But if we were sure of the best form of government ; if not only “ the world was all before us where to chuse,” but we were to exhaust the imagination, or to realise the fancied draughts of Utopia or Lugnag, in forming this model of perfection ; how could we be sure it would last ? Government, like natural things, will be ever fluctuating in some degree ; it will be pushing on from infancy to maturity, and from thence to decay. It is ever apt to aim at being greater than it is, but can never exceed a certain magnitude. Universal monarchy

D 4 has

has been the aim of many States, both ancient and modern : the aim has been made with much the same success in the end. It is what no Government will ever arrive at ; because “ the Balance of Power,” its natural check, is as old in speculation and experience, as the thoughts of universal monarchy. Societies are still, with respect to each other, in a state of nature ; and as jealous of liberty and independence, as individuals are : And the protection of as much liberty as is possible, is or should be the end of forming alliances between States, as it was of forming States, by entering into society.

It is pleasant however to see the natural progress of society to enlarge itself ; how States have grown by degrees. England, in uniting Wales, Scotland, and Ireland ; the Saxons,
still

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still further back, reducing the Heph-
tarchy to a Monarchy. It is but of
late that France has united all its
Dutchies to the Crown. And what
an amazing progress to power did
Spain make, first by the union of
Castile and Arragon, and then uniting
Germany and the Netherlands under
its own head? Then see, by a terrible
reverse of politicks, those very Nether-
lands, after an intermediate indepen-
dence of scarce a century, conquered
to make up the greatness of Lewis
the fourteenth; who, if he had not
been obliged to abandon by treaty the
union of France and Spain, when he
had almost effected it by his arms, would
have made very large strides to an over-
grown power.

But overgrown power must be its
own enemy, as well as that of the rest
of the world. Territory in many

cases may increase to the diminution of real power : not only because the eye of Government (one may say) can scarce reach, or the arm of Government protect, any very extended territory ; but because other neighbouring States will naturally endeavour to reduce a greatness that threatens their ruin ; and besides open attacks will sow factions, and make use of one part against another. England, with respect to its possessions, or its connections with the Continent, was never so strictly an Island, as in the reign of Queen Elizabeth ; it was never more formidable to Europe ; partly indeed from the situation of its neighbours, as well as its own. Our large acquisitions and conquests on the Continent before that time, only kept us in perpetual war, tho' they well enabled us to support

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it. Our connection within this, and the latter part of the last century, has not, I trust, been productive of the mischief to which the imagination of Party has swelled it, but has, on the the other hand, been of the utmost consequence to England. What becomes of its grandeur in the political system, its commerce abroad, or its true happiness at home, without the most vigilant and active attention to the complicated and jarring interests of the rest of Europe? But I find I am unawares descending to particulars, which I disclaimed at my entrance on this subject; and for fear of usurping on your province, Eunomus, which with some impatience I expect you to assume, I am glad to stop here.

EUNO-

EUNOMUS.

§ 13. That impatience you own, has, give me leave to say, imposed on you, both in making you think you have acquitted yourself of your task, and in the expectations it has formed in you of hearing me. 'Tho' you have all along with extreme caution declined giving us any particulars about government, I was in hopes as a traveller you would entertain us with some observations on what all Governments, even according to your own account, must have ; I mean the Laws of Society.

PHILANDER.

Impossibilities, my friend, were no part of my scheme : a good French critick says, "*Le Bresil etoit decouvert pour les Marchands longtems avant que d'être decouvert pour les Médecins.*" I
may

may say very few countries out of Europe are yet discovered for the Lawyers, tho' the Merchants, the Physicians, and the Professors of mechanic, as well as liberal arts, have long gleaned from all the world. The truth is, Lawyers rarely travel themselves; and their stock can be enriched by none but themselves. There have been those who in their travels, have picked up a whimsical Law, as they would an extraordinary fossil, or the like: there have been those too, who have collected some scattered discoveries of this kind, of which Montesquieu's book is the only instance worth naming.

I own the Laws of different Countries, if they could be come at, deserve our notice on many accounts, as a very entertaining, I will even venture, tho' no Lawyer, to say, the noblest

noblest study in themselves ; being the greatest exertion of natural reason towards the happiness of society. They are useful too, as explaining the history of those nations they belong to ; and as connected with one another, or producing others : there being no nation, at least none eminent for civilized institutions, but what in its infancy has borrowed in part from the settled policy of others. Thus Sparta did from Crete, Athens from Egypt, Rome from Greece, and all the world in some measure from Rome.

But it is no wonder that the Laws of other countries are so little known, if we consider, 1. That Laws are a subject which few people are acquainted with. Very few, comparatively speaking, know any thing of those under which they are bred, and of which they daily partake the benefit.

2. Where there are abilities and inclination, there is too often want of opportunity. The knowledge of Laws wants a longer residence, and a more select acquaintance in foreign countries, than what would serve for describing or collecting natural curiosities: they are a subject which, as every body that visits a foreign country cannot understand, so every body that lives there cannot communicate. 3. Many countries themselves, have no materials of this kind to communicate. Very little Law, I imagine, is to be looked for among the Indians in America, or the States of Barbary.

EUNOMUS.

I find then we are rather to thank you for what you have done, than to expect more; and if so, the best apology I can make for my undertaking,

taking, will be the readiness with which, at your command, I set about it.

§ 14. The excellence of the English Constitution, tho' not sufficiently admired or understood by the generality of those who live under it, has been the object of much applause to many foreign writers of the greatest eminence. Some of them have commended it in a minute description of its particular qualities; others, in discussing that celebrated question "about the best form of Government," have terminated the dispute, by deciding in favour of that "mixed form," which chiefly resembles our own.

The Constitution of this Country, in a few words, is that of a limited Monarchy. The Laws by which it is governed are what every man in it consents to; the Legislature virtually residing

residing in the King, and the whole Body of the People : as every man is a party, either in person, as the King and the Peers ; or by Representation, as the Commons. The two former by an inherent, the latter by a delegated right. The ordinary power of interpreting those Laws is distinct from the Crown and the Legislature : The executive power is solely in the Crown, assisted by Council of its own choosing.

The features of *Monarchy* are visible in the executive Power being vested solely in the King, and in every point of his Prerogative. The *Limitation of the Monarchy* is visible in the King's governing according to settled Law, and in his being only a part of the legislative body.

Thus are we, in fact, possessed of what Heraclitus of old pictured to
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himself as the best idea of Government, *the art of governing All by All.* And considering Government as a kind of political Architecture, if a Constitution like our own resembles a Pyramid, because that, of all figures, is the firmest, from the breadth of its base, and its being terminated in a point ; as Government cannot have a wider foundation to rest on than universal consent, or a narrower point than the executive authority of a single Person ; we may reasonably hope, while it stands on its base, that this Pyramid may vie in firmness and stability with those famous monuments of Egypt.

§ 15. If I was expected to expatiate on the essential parts of the Constitution thus described, I must repeat and explain, in less general terms, what are the rights of the king and the people.

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The first are well enough comprehended under the single word "Prerogative." By Prerogative I mean the ancient constitutional Rights and Power vested solely in the Crown. This is a copious subject, when it comes to be detailed into the several Branches of Administration, Revenue, Suits, and the like. The great writers upon it, Lord Bacon and Sir Matthew Hale, tho' they have said much, have left more unsaid. But the Power of the Crown in the executive part of Government, whereby the King acts for the Public, is what we are most concerned with at present, as pervading the whole, and active in every part of the kingdom, and at all times. And so absolute is this Prerogative of the King, confined by the Constitution to the Execution of Laws, not extending to the making of them, and exercised in the practi-

cal part of Government ; so absolute, I say, is it, that neither House of Parliament regularly takes cognizance of any thing that is past, without an authentic information of particulars from the Crown itself, either in debates on the speech delivered from the throne, or on papers laid before either house by a message from the King, or in consequence of an address to him for that purpose.

To shew *Prerogative*, thus defined, is not an enemy to *Liberty*, to which some have ever affected to oppose it, I would reason thus : that the only idea of Liberty in society is the power of acting as we please, in all cases not forbid by known Law ; that the just Prerogative is part of the common Law, and must be evidenced in every instance as common Law itself is ; that is, by immemorial usage, uncontradicted

dicted by Act of Parliament ; and therefore that the Power of the Crown so evidenced, can no more be repugnant to true legal Liberty, than a particular Law is. No new Prerogative can start up at this day, any more than new common Law ; and any pretence to either, that is contradicted by antient usage, and not supported by Act of Parliament, can have no binding power, or produce any legal restraint on natural Liberty.

The chief power then of executing national councils, does, by the constitution, reside in the Crown : but the King, as a part of the Legislative Body, can in regard to Laws, do nothing in the first instance ; he can always reject, but can never propose. His Power in that particular is only in the last resort ; like that of a court of justice that has final jurisdiction on

appeal, but cannot interpose in the first instance. In both cases, the excellence of the Constitution is seen, as both are by these means subject to the greatest exercise of the wisdom and justice of the nation.

The two Houses of Parliament are in all legislative Steps mutual checks on each other ; each an active part of the Legislature ; each possessed of valuable privileges and peculiarities. The House of Lords is the highest Court of Justice ; the House of Commons the highest Inquest of the kingdom, The Judges, as I said, are assistants to the House of Lords in their judicial capacity, but are members of the Body of the Commons, as they emphatically stiled themselves on a former occasion.

§. 16. The Constitution thus defined as to its essential parts, has been
grossly

grossly misrepresented in many very important points ; which if I do not clear to your satisfaction at present, I shall so far obtain my end as to awaken your attention to them hereafter.

The records of English antiquity, few of which remain, and those few not fairly examined, have occasioned some doubt about the antiquity of the Constitution : as if in the more ancient parts of its History, the traces of absolute Monarchy were discernible : as if, even in times succeeding the Conquest, the Liberty the people were in fact possessed of, was rather an Act of Grace in the Crown, than a matter of Right in themselves.

That the actual exercise of Government has often in reality deviated from that Constitution now described and at this day enjoyed, is too plain to deny ; and in what manner it has

done so, I shall attempt to reflect on in the following observations. But the remarks Philander has already made will bear me out in saying, there is a great difference in the out-set between considering these successive variations as so many new attempts to settle a Constitution, or as endeavours to bring it back to the old one already settled.

History indeed carries us back as far as times preceding the birth of a single Government in this island. Cæsar found the Britons divided into several little States ; and the Saxon Heptarchy broke that assemblage, which the Roman Government in a great measure had formed. But from the first dawn of Monarchy (if even these little States were not each limited Monarchies themselves) Laws are to be found coeval with it : From
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the Conquest, I suppose, this does not admit of a dispute ; tho' I am aware even at this period, the Laws which I urge as a proof of the Limitation of the Monarchy, are turned against us : and the objection on a larger bottom is, that the Laws, for a long time after the Conquest, carry the air of a Royal Grant on the face of them, rather than that of a Parliamentary Sanction. This objection might be answered from the style of the Laws themselves ; and in that view, the strongest exceptions that could be taken, would vanish as soon as mentioned.

Others have argued from the want of Returns to Parliament being found, to the want of Being of a Parliament itself ; which supposition, besides being refuted by fact in this instance, may

may be extended to shake the credit of half the English history.

Again, the formation of two distinct assemblies of the Lords and Commons, some have as wisely made the *Æra* of Representation of the People; tho' there are arguments enough to prove, that the two Houses were as distinct in their legislative capacity when they met together, as they were when they separated, and formed two Houses, as we now understand the phrase. It would otherwise have been unnecessary to have reckoned them as component parts of a Parliament in the antient Acts, as was usually done long before any traces of distinct parliamentary assemblies.

The true antiquity of the Representation of the Commons is a point, as I take it, entirely unfathomable. There is very little evidence at all
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about the matter, that goes very far back ; and most of that is so ambiguous, as to furnish no clear decisive conclusion. But whatever the mode of this representation originally was, or tho' it might long continue to be different from what it has since been, it is very difficult to dispute its existence : because it corresponds with the abstract reason of things in the idea of a free Government ; it results from the origin of Government as founded on consent, and that of our own in particular, not an absolute but a limited Monarchy. The Body of the People must, therefore, always have had a right to share the legislative power ; it cannot be supposed this right could ever be entirely given up, but only delegated to some, entrusted to act for them.

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The latest writers upon the subject, who have ransacked the voluminous controversy kept up by Dr. Brady, Pettit, and others of the last century, and who may be supposed to have picked out from all of them what they apprehended the strongest part of the argument, have left it just where it was. And as it is easy to see that in discussing this question much must be supposed, as well as argued; it may be as well for the future, at least for us at the present, to suppose at once (without the parade and futility of argument) a thing in itself highly agreeable to reason, rather than again to attempt to prove it, much more than to attempt to disprove it, by a crowd of authorities, most of which are dark, equivocal, or inapplicable.

The Separation of the Houses is commonly referred by historians to
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the time of Edward the Third ; tho' I have never been able to find on what argument the supposition was built, except that of seeing no traces of separation before that time. The precise year of the separation no body has ever pretended to fix ; but the supposition of the separation commencing in the reign of Edward III, is very probable, as will appear from considering a very particular circumstance ; which I apprehend will support the notion rather by a positive fact, than leave it to be barely concluded from want of evidence to the contrary.

Lord Hale, from a very careful inspection of the old Parliament Rolls, has observed, that from the time of Edward I. Acts of Parliament were drawn into the form of a Law in the first instance ;—but he adds, “ that from near the beginning of the reign of Edward

ward III. 'till very near the end of Henry VI. they were not in the first instance drawn up into the form of Acts of Parliament, but the petition and answer were entered in the Parliament Rolls, and out of both, by the advice of the Judges and others of the King's Council, the Act was drawn up conformable to the petition and answer."—The observations arising from this remark of Lord Hale's I think are fairly these, that on the one hand, the separation of the Houses, supposing it happened in his reign, accounts for this alteration with respect to the introduction of the petition and answer : on the other hand, that this alteration in the manner of passing Laws, was an immediate and necessary consequence of their separation, and therefore in some degree a proof that they separated at this time, and not before. For,

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1. the time itself corresponds in both cases. 2. Their connection seems evident by considering that more form must necessarily be required in obtaining the Royal Assent, and the assent of the Lords, when neither the King nor the Lords met together with the Commons, than what was required when they did meet together. This conjecture, however, on a nice point of antiquity, will, I am convinced, be received with candour, as I promise, on my part, it will not be defended with obstinacy against reasonable conviction.

§.17. One would think the objects of Representation should be less liable to difficulty than either its antiquity or origin. Every body might know what a Parliament is, and that it consists of the “*three Estates of the Realm* :” yet even here writers of great character

ter have introduced a difficulty, tho' sometimes perhaps rather to manage a present controversy, than grounded on any real doubt of their own. Some, by the "three Estates of the Realm," understand the Nobility, Commons, and Clergy; and hold a Parliament consists of the King and the three Estates of the Realm. On the other hand, the better part (as I conceive) include the King as one of those Estates, and in their notion, the King, Lords, and Commons are the three Estates of the Realm: these, it is plain, do not in this respect distinguish the Bishops from the other Lords, nor the Clergy from the Commons.

Now if this controversy is not merely verbal, as I suspect it is, it is capable of being brought to a short issue. It may be allowed, I think, that an Estate of the Realm, considered as
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a component or integral part of the Parliament, if it means any thing, must mean one of the essential parts of the Legislature ; without the consent of which, or of the majority of the individuals that compose it, no Law can pass. Thus it is well known if a Bill does not gain the consent of the Lords and of the Commons, as well as the Royal Assent, it never becomes a Law. Those who maintain the Clergy, as distinguished from the Laity, are a distinct State of the Realm, must, in defence of one absurdity, be obliged to maintain a much greater : they must suppose, as indeed they seem to have done, that the Clergy in Parliament must be represented by the Bishops : from which notion these consequences follow ; 1. First then the Clergy, who are, except the Bishops, all of them strictly Commoners, are

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repre-

represented by Lords ; a mode of representation not analogous to that of the Commons among the Laity. 2. If the Bishops are the Representatives of the Clergy, and in that case a State of the Realm, their concurrence must be an essential requisite to an Act of Legislation : no Law can pass without their consent. This, as I have already said, must be the idea of an Estate of the Realm. Perhaps they will abide by this latter consequence, and in proof of their notion, refer us to the legislative declaration in every Act of Parliament, which runs, "It is enacted by the King, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in Parliament assembled." This distinct enumeration, they may urge, shews the Spiritual Lords are a distinct State of the Realm. In my turn I must ask, 1. Whether the
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the Spiritual Lords would not be included if not expressed ; if the clause had run by the King, Lords and Commons? If I mistake not, this form has been used. 2. But tho' expressed, does it mean any thing more than a bare division ? Would not the third Estate, the Commons, if characterised by the various objects of Representation, be the same in effect as it is now, if it was to run (instead of Commons) Knights, Citizens, and Burgeesses in Parliament assembled ? This form I know has been used, and the effect has been the same : and if any argument is to be drawn from the familiarity of the cases, the express mention or omission in the first case would have no more weight than it has in the other. And yet tho' the express mention of the spiritual Lords does not make them a distinct branch

of the Legislature, there seem to be many good reasons for this form. This insertion serves as a constant recognition of their Legislative capacity, either 1. to prevent people in all ages arguing against their legislative right, from some peculiar circumstances attending them ; as their not being tried by Parliament as temporal Lords, or their not giving their votes on the Trial of a Peer, tho' they attend during the evidence ; and when they retire, protest their right of voting. 2. More particularly in these later times, to express a just abhorrence of the former age, when their rights were so wickedly attacked, and their removal from the House of Lords was the first step to the dissolution of the Government.

But the question now before you is, whether the Spiritual Lords are a dis-

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tinct State of the Realm ? It is clear
 in the material sense as a distinct
 Branch of the Legislature they are
 not. For suppose a Bill brought into
 the Upper House which the Bishops
 were unanimous against, and that the
 Temporal Lords, or at least a major-
 ity of them, was as strong for it ; I
 apprehend the Bill must pass, not-
 withstanding the dissent of the Spi-
 ritual Lords. If so, they can be no
 separate State of the Realm. Whe-
 ther the insertion of the consent of
 the Spiritual Lords should be continued
 in the Bill in such case, being an aver-
 ment against fact ; or whether that
 insertion is rather matter of form (for,
 tho' ancient, it has not been regular
 nor uniform) might be matter of
 question ? But suppose a stronger and
 a more probable case, that the major-
 ity of Bishops were against a Bill,

and the rest of the Bench concur with the majority of the temporal Lords in passing it ; the expression in the Act would in that case be realized, and I make no doubt the Bill would pass : or else it must be allowed, the majority of the Bishops might at any time controul the majority of the House. But if the Bishops are really a distinct State of the Realm, the majority of their order is as necessary to every legislative act, as the consent of the majority of the Commons is to pass a Bill thro' their House. So that in whatever light the case is considered, it appears the Bishops do not represent the Clergy in Parliament, or can be considered as a distinct State of the Realm. I know the argument of a considerable writer on this subject, chiefly turns on the admission of his antagonist, “ that the Clergy are one
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of the three Estates of the Kingdom, and he infers from thence (justly as it seems) that they must therefore be one of the three Estates in Parliament." But I am at a loss to guess what that writer means by three Estates of the Kingdom, unless considered in respect to Parliament. If the subjects of this kingdom are to be considered in general as Clergy or Lay, there would be but two Estates of the Kingdom; but if according to their Professions or Employments, there may be ten times as many.

§. 18. The Constitution has likewise had the ill fate to be censured as well as misunderstood. But because my audience are as little disposed to listen to cavils, as I am to be at the pains of refuting them, I shall not mention any trifling exceptions, but some that are of more weight and

more extensive consequence. The Representation of the People, it is thought, is not only grossly unequal, but in effect perverted from the natural Interest of the Country. If I understand this last objection, it might be waved in this disquisition ; because it is rather an accidental deviation in fact from the Constitution, than any fault to be imputed to its frame and essential structure : but however, it shall not altogether be passed over in silence.

The Representation then is censured as very unequally distributed. The Counties and large Cities are thought to have too few Representatives, and the infinite swarm of little insignificant Boroughs, which Bishop Burnet has somewhere called "*the rotten part of the Constitution*," are thought, and, in one light, justly thought,

thought, to have too many. Those who make this objection will extend it by enumerating consequences, to which their imagination, at least, has given an air of reality. They will tell us, that it is from hence, if from any quarter, must creep in that corruption, that may, in time, destroy the Constitution. For those who come in by Corruption, will maintain themselves there by it; will sell their vote to reimburse the purchase of their seats. They will tell us, that it is bad in many other views; that hence the monied Interest come into Parliament, in opposition to the natural Interest of the Country; and those who have not a foot of Land (say they) will care very little for the Measures that chiefly affect it. What is it to them, whether the Land is over-taxed or uncultivated, while the Traffic of Public Funds

Funds is advancing on its decay? The surprising number of little Boroughs too (independent of the Corruption, that probably flows from hence) will be one reason, why many of their Members must be Strangers to the particular Places they represent. Not, perhaps, Strangers to the Constitution, as in the former case; but such Boroughs must be represented by those, who, if equal to the trust, yet living at a great distance, can never protect, or be acquainted with the Interest of their respective Boroughs, so much as others of equal abilities must be, if chosen from their own neighbourhood or Country. This was the wisdom of the Constitution (it may be said) in the return of Juries; can we imagine it to have been less intended, as to Members? Was every Case of Private Justice to be decided

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by those, who from their vicinity to the place, where the Question arose, might best understand the nature of the Case and the Evidence before them; and yet questions of importance to the Community, more particularly to some parts of it, are fit to be discussed by those who are acquainted with no one part of it more than another? The term *Election*, they will add, must become merely nominal; or else who can suppose it natural to *elect Strangers* to represent them? the *Congé de Elire* for a Bishop, is not more fabulous than such an Election of a Member. The Writs of Election themselves, speak as strong in this case as the other do in case of Juries. Particular places themselves too, it may be thought, suffer in other respects on this account, besides having nobody to promote or protect their Interest in Parliament.

Parliament. A decay of hospitality, the good genius, as it were, of a country life ; and a neglect of the friendly intercourse between Landlord and Tenant, may often be another consequence of slighting the owners of landed estates as Representatives. There is no tie to live with, or do good acts of neighbourhood to those, who, in the most important cases, will prefer a Stranger to a Neighbour. Rents can be returned at a distance ; and tho' the Estate may suffer when deprived of the residence of its Owner ; or the Profits may be sunk in passing thro' the Stewards hands : yet the Owner submits to this tax, to live more at his ease or fancy elsewhere.

Tho' these circumstances should not always take place ; yet the eye of reason, impartially surveying the plan of a well-modelled Legislative Body, will
look

look upon a small Borough sending as many Members as one of the first trading Cities, or as a large County, in almost as ridiculous a light, as one particular instance of Representation, alluded to by Mr. Locke, than which nothing can be more confessedly absurd, “ that the bare name of a Town, of “ which there remains not so much “ as the ruins, where scarce so much “ housing as a sheep-cote, or more inhabitants than a shepherd, are to be “ found, should send as many Representatives to the grand Assembly of “ Law-makers, as a whole County, “ numerous in People and powerful “ in Riches.” All this may be said perhaps in support of the objection.

§. 19. What are we to say in answer to all this? These two things I conceive. 1. That admitting this inequality to be the grievance complained of, it cannot

cannot now be redressed. 2. That it may reasonably be doubted, however, whether, every thing considered, it is in fact such a grievance or not.

If it is a grievance, it is such an one as cannot be redressed. And I found this assertion on two grounds ; that the very attempt to do it would totally unhinge the Constitution. And if it was once done, according to the most imagined plan of perfection, the effects of it could never be lasting.

Political Projectors will tell us perhaps, this new modelling of the Legislative Body would be only, “*Ripigliare Il Stato*,” in the Florentine phrase ; bringing things back to their original establishment ; an expedient approved of by all politicians. I should rather look upon the expedient, in this case, not as an attempt to re-
settle

settle, but to new-found the constitution : which if it could succeed at last, must in the preparation towards it produce universal confusion ; by dispossessing every part of the Kingdom of Rights they have so long been possessed of ; and in their nature the most important of all others, because they are the foundation of their security and protection. To disfranchise the Boroughs themselves, answers no end ; a prescriptive Right of sending Members would continue : to disannul that prescription would be little less than Suicide in a Parliament. It could never be thought of in practice but in the most troublesome tumultuous times ; or at least cannot fail of producing them. It was not perhaps the worst project of Cromwell's time ; but it was certainly a project fit for no time, but such as his : when the constitution
was

was already overturned ; and it was only left to consider how they could build a new one on the ruins of the old.

But supposing this Reformation once made, could it be lasting ? Would not this inequality in the Representation imperceptibly recommence almost as soon as reformed ? Much of it is owing to the surprising alteration that time and accidental causes have produced in the commerce, wealth and importance of places themselves. Some, for instance, were once Episcopal Sees, and Places of great opulence ; tho' now within the reach of the objection, almost as much as any Borough whatever. Another cause of the inequality complained of, arises out of this already assigned. Many Boroughs have been so sensible of their decline, and their comparative unimportance to the
Community

Community, that they have themselves petitioned against, and abolished their own right of Representation. For a Member's wages, it must be owned, was, heretofore, no inconsiderable Tax on a small Borough. And may not these causes, at the distance of some centuries, operate as strongly after a Representation was new modelled, as they did before, when they gave rise to it?

If then this inequality of Representation cannot be altered without the utmost hazard; and when altered, cannot be secured from returning: what reasons can there be for making the alteration? Much less, sure, is to be said for the alteration, if the thing itself is such a grievance, as is neither publicly seen nor felt.

In fact, the grievance from this quarter is chiefly speculative; the objections

tions I have stated on this head, do not flow altogether from this source : they have other causes capable of producing them as well as this. And the objections are so far from actually existing at the same time, (as they are stated) that one may serve to take off the force and pressure of the other.

In the first place, I am not satisfied that small Boroughs are the only spot where Corruption thrives ; it is a weed that naturally thrives best in a rich soil ; it grows up with Liberty. It cannot be perfectly rooted out, without injuring the better product of the Soil itself ; but there are ways of keeping it under.

But small Boroughs, it is said, are more liable to Corruption, because more likely to be represented by Strangers ; and this goes upon a supposition, that the Election of a Stranger is, in
2 effect,

effect, rather a purchase than a choice. That many of the Representatives of small Boroughs, must be Strangers to the Places they represent, I admit; those who are qualified, merely in respect of neighbourhood, may be disqualified for the trust in other respects; neither their fortune, capacity, nor inclination, may sufficiently concur for this purpose.

That small Boroughs must exist as well as large Boroughs and Cities, has been already clearly shewed; and that Time and Chance will be an overmatch for any Reformation of this kind.

But from the necessary existence of small Boroughs, I am enabled to answer the objection that was made to them, merely from their being represented by Strangers. 1. It is not only necessary they should be so represented,

where there is *no one qualified* who is an Inhabitant or Neighbour; 2. But even on many accounts, tho' there is. And this latter for the Interest of the Borough itself, and of the whole Community at large.

1. For the Borough itself. For by these means, the Choice may as well be supposed, on an equal Chance, to be improved in some instances, as perverted by Corruption in others. Should it be insinuated that a Stranger is not able to promote the particular Interests of any Borough so well as one that has a natural Interest; it may well be doubted. In the first place, when a Member is once Elected, there is a total delegation of the political Power of the Constituents to the person elected as their Representative; without their being able to enforce their instructions to their Representative; or his being
account-

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accountable to his Constituents for his conduct. And however dissatisfied they may be with his Conduct, in respect to public Measures, or the Interest of the Borough in particular, I know not how they can redress it otherwise, than by being more cautious in the disposal of the Trust for the future, when the term of the Trust expires. And this circumstance, among others, undeniably proves the necessity of frequent Parliaments, for the freedom and welfare of the Constitution. But supposing a Member (as we may in general suppose him from motives of Gratitude as well as Interest) inclined to listen to the Instructions of his Borough. A Corporation may inform a Stranger, as well as they could one of their own Town; and he can present their Petition to the House as well as any one else. But what, in the

mean time, is this *Natural Interest* that is so much talked of; that gives one man, who lives within a mile of a Corporation, so just a preference to one who does not live within an hundred? It is not in point of abilities of the Candidate; because abilities are not local. For the same reason it is not in point of income. The objection, perhaps, supposes, that the Income of a Stranger is too apt to bear down every thing else; to lay abilities entirely out of the case; and to make its way merely by its weight. Are then, on the contrary, the abilities and character of a Neighbour always the ground of such an Election? Or is there no violence done to the Freedom of Election, from this quarter? Such an Election may often be the effect of an undue influence, tho' not of Corruption; Corruption, I mean in the confined

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fined sense, in which it is commonly
 used to denote pecuniary influence
 alone. And in arguing this question,
 you will excuse me if I desire another
 Term may be settled as well as that
 just explained. If Natural Interest
 means only (as I take it) a large Estate
 in the Neighbourhood of a Borough-
 Town; the argument in favour of its
 Proprietor is by no means conclusive.
 If the idea of a large Estate was na-
 turally united with an idea of actual
 Benevolence, as extensive as the oppor-
 tunity of doing good: when it is so
 united, how is it possible an Election
 should not be decided in favour of such
 a Candidate? And who, that was not
 lost to all sense of Merit, and of his
 Country's Interest, can wish it other-
 wise? But if the owner of such an
 Estate should either be not known to
 his Neighbours, or known greatly to

his prejudice : if he was to bribe or to threaten his own Tenants to compel their assent to his Nomination ; tho' he owned half the Borough Town, I should always think, any one in the World (that the Law would allow to be a Member) would be a more eligible person, than such a Candidate. It might then happen to be the Interest of the Borough itself to chuse a Stranger.

2. That it is for the advantage of the Community at large, that many Boroughs should be represented by Strangers, is a concession we have a right to expect from those who censure the general inequality of Representation in this Country. I will explain myself by particulars. The County of Middlesex, for instance, where all the Business of the Kingdom is transacted, where every person of figure almost in
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the Kingdom resides, either constantly or for a great part of the year, contains but one single Borough: some remote Counties have at least a dozen. Is it not for the Interest of the Public, that many of those who live in this County, should consult on National affairs? Many of them have no Natural Interest out of this County; and, therefore, unless they offer themselves to Boroughs in another County, where they are Strangers, they can have no share in Public Councils. This, in effect, brings the Representation nearer to an equality; by these means Middlesex or London, tho' each has but one Borough, will have, in effect, ten or twenty, as its principal Inhabitants may be elected to serve for so many Boroughs elsewhere.

There is another and no very inconsiderable advantage accruing to the
2 Community,

Community, from the admission of Foreigners (if I may call them so, in opposition to Residents) to represent Boroughs, where they have no particular Interest: that by these means Irish Peers, and the Eldest Sons of English Peers, are more easily enabled to have a share in concerting public Measures. From the first circumstance, more harmony between the two Nations, is likely to be the consequence of the same Person being capable of consulting the Interest of both. And as to the case of Peers Sons, particularly the Eldest, sitting in the House of Commons, I do not so much rely on the advantage of two in the same Family having a Seat in both Houses, because it is but an accidental advantage, and may change its complexion according to the State of Parties; but I must urge it as an excellent Constitutional

tutional Education against they become Peers themselves. They by these means become early acquainted with business; and will scarcely forget ever afterwards, in the Upper House, the Liberty and Privileges of the Lower, which they formerly insisted on as Members.

I hope after this tedious Examination of a censure too hastily passed on the Constitution, I may conclude; that the inequality of Representation is not in reality the dreadful grievance complained of.

§. 20. The other censure that was passed on the Constitution, from an improper as well as an unequal Representation; I said might be waved, because it is not general, and not so much to be imputed to the Frame of the Constitution, as to a disregard of it. I did, however, state that objection,

as

as it blended itself with the other ;
and I will now shortly consider it.

The *Monied Interest*, in opposition to the *Landed Interest*, considering them as absolutely distinct in the Proprietors, ought never to be preferred to the Landed Interest in the choice of Representatives. The reasons urged in the objection seem unanswerable. But where one kind of Property is tempered with the other ; the reasons, on which the objection turns, seem to fail. And it is sufficient to say, the Laws of this Country, as well as those of all well-policied States, have secured a Landed Qualification as a necessary Requisite for the admission into National Councils. I shall only add, in a general view of the Constitution, it would be very unreasonable to examine the propriety of every particular Measure, which the Law has prescribed ;
where

where the Constitution has necessarily entrusted the Law with the power of making such provisions as the occasion requires. I only wish I have not been too particular already.

I flatter myself I have already traced the great outlines of the Constitution; if these are correctly drawn, it will be easy to fill them up at any time. It was admitted at the outset, that the administration had sometimes differed from the Constitution described; I will not scruple to say, in some instances, it has varied so much as nearly to destroy it.

§. 21. When I go on to explain this, it would very ill become me to reflect upon any little miscarriage in the event, or misconduct in the Councils of this or that particular year; the present subject is too great for such a minute attention to particulars; my
own

own abilities as well as inclination are too small to set about it. Fundamental Errors are important and standing lessons ; the reflections that arise from facts of a general nature, where they do reach particular men, are supported by History, which is the voice of Truth ; and borrow no Complexion from a spirit of Party or Detraction.

From the Plan given of the Constitution, you must collect, that its Preservation depends on the free action of its several parts : it is this alone preserves the Balance. The executive Power, by the Constitution, is vested in the King alone ; if, therefore, either or both Houses of Parliament were to take the Administration of Government into their own hands, there would be an end of the King's Prerogative for the time, and in that of the Constitution. The Constitution would
be

be equally overturned, if the King was to assume the sole Power of making or dispensing with Laws; because in either case the Parliament would be but a shadow.

I have already disclaimed shewing in particular instances, how this Balance has been affected; let us just view it in the general course of History; more especially from that period, where the Civil Constitution becomes more easy to be traced, and more necessary to be known; I mean from the time of the Seventh Henry.

§. 22. The Government, in the actual exercise of it, in the early times succeeding the Conquest, inclined sometimes to the Regal, sometimes to the mere Aristocratical Form. The Political maxim is, in general, very just, that says, "Power follows Property." And in the times, when the Feudal
Tenures

Tenures prevailed in their greatest purity, the power of the Lords, had it been regularly exerted, might have made the Government Aristocratical. But their occasional adulation, or unequal opposition to the Crown, often brought it nearer to an absolute Monarchy.

Henry the Seventh depressed the ancient Nobility as much as he could. He governed principally by an Ecclesiastical Ministry, whom he altogether raised and had in his own Power; he attainted the Yorkists, of whom the Nobility chiefly consisted. He consented to some Laws, made to promote the freer disposal of Estates Tails; and these circumstances co-operated with an increased Luxury, that was the offspring of an increased Commerce.

That depression of the Nobility, by taking some weight out of one Scale, brought the Popular Scale nearer to a
Balance

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Balance with the Nobles. And the other, added to the Popular Scale, by their own Trade and increase of Riches, from the discovery of the new world, brought them still nearer to a Balance.

But the Political consequence of the People, tho' greater with respect to the Nobility than they had ever known, was but little, as yet, with respect to the Crown. And from King Henry the Seventh to King James the First, including both their Reigns, the Crown exercised more than its share of the Legislature; and the People had less of Liberty than the Constitution designed them.

A too sudden and obstinate check of the Power of the Crown, at the close of the next Reign, produced a sudden Democracy. And, indeed, it is scarce to be wondered at, that a People who had so execrably vacated the Throne,

H would

would abolish a House of Lords. A just repentance of this Usurpation, guided by the Hand of Providence, shewed itself in the Reformation. But from that time to the Revolution, tho' each Part of the Constitution was nearer its proper poize ; it rather gave way to a stretch of Prerogative, and a thirst of absolute Power. In the first Reign, from the indolent disposition of the Prince, the artful gaining of the Nobility on his side, and the undue exertion by the Commons of the Power they were then possessed of: and which, from being over-great in the foregoing Reign, sunk below its proper level in this. In the Reign of King James the Second, Bigotry co-operating with the same spirit of Prerogative, had a stronger tendency to absolute Monarchy ; but moving more violently, was more suddenly and fatally

DIALOGUE III. 99

tally checked. From the Revolution, I believe we are all agreed this Balance of the Constitution has been, upon the whole, excellently preserved : and whatever little storms or heats of Faction have arisen, (as no length of time will be free from them) they have rather served to explain and settle some important Points, than in any great degree to violate the Constitution.

§. 23. The Balance then of this Constitution, you see, has sometimes been lost ; tho', by the Hands of Providence, it has, in time, been again restored. And if we were to glance back, ever so slightly, on History, we shall find the only methods that have or can be employed, to destroy this Balance, is by over-straining the respective parts of the Constitution.

It was Lord Burleigh's maxim,
 " that England could never be ruined

“ but by a Parliament.” It may, however, be greatly hurt, if not ruined, without one. If the Crown was either, of course, to dissolve a Parliament that opposed its Measures ; or made a point of securing a Majority to carry them, either by numbers of Place-men in the Lower House, or an occasional increase of Peers in the Upper ; this would make large strides towards the application of Lord Burleigh’s maxim. But we have seen from History, the Crown may be more prejudicial without a Parliament than it can with it ; by an improper or ill-designed exercise of Prerogative. A Parliament that is fitting, has various ways of obstructing the progress of such mischief ; by refusing supplies ; by remonstrances to the Crown ; by impeaching a corrupt Ministry. And in this last particular, the Constitution has gained much security

curity by the concession the Crown made in the Act 13 K. William III. in giving up the power of pardoning in cases of Impeachment by Parliament: for otherwise it is evident the most corrupt Minister, under a public prosecution, after the most glaring proof of his iniquity, could easily have defeated all, as it were by pardoning himself. But as no extensive schemes can be pursued without money; the Power of the Crown will necessarily be connected with the Parliament; and, therefore, unless a King is inclined to reign without a Parliament, and support bad Schemes, either by Exactions at home, or Loans from abroad, (both of which were formerly practised) the execution of his Schemes must be enforced by a Parliament; and England, if it is ruined, must in such cases be ruined by a Parliament. That pe-

riod, I hope, will never exist; judging, at least, from the Constitution grown up to its present maturity, and the essential parts of it excellently well preserved, I flatter myself, that period will scarce arrive, till universal Barbarism once more darkens this Western Hemisphere; and Political Liberty, with Science its constant Companion, is exiled to some distant part of the Globe.

POLICRITES.

§. 24. I find you are winding up your subject, and by the tone of your voice, will soon drop into a conclusion. But, entertained as I have been, I have all along been disappointed, in having no sketch of our Legal Polity. Which surely, in a Constitution governed by Law, as you set out with observing, is a subject of great impor-

DIALOGUE III. 103

tance ; and which you cannot have the excuse for declining, that Philander made with great propriety in his part of the conversation. Tho' I suspect your good breeding, rather than your memory, is to be blamed for this omission. You seem industriously to have avoided that topic, perhaps looking on it as a mere drug to one who is of the Profession, or rather out of compliment to Philander, who is not.

EUNOMUS.

I cannot but say, that each motive had some weight in occasioning my silence on that head.

PHILANDER.

I do not see why they should ; I can answer for my own curiosity to be informed upon that subject, and I am sure you can do it in a manner that

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shall

shall not be prejudiced by my want of experience. Policrites has already begged it; I concur with him; but must desire you would address yourself to me altogether, as if Policrites was out of the room; otherwise, your meaning may be so involved in the mist of technical Language, that it will too often escape me, and I might as well be out of the room myself.

E U N O M U S.

I believe Policrites will join with me in thinking your restriction very reasonable; and I will endeavour to conform to it, as well as satisfy your request.

§. 25. To give you a tolerable general idea of our Laws, which is all that can be done in this conversation, instead of puzzling you with the scholastic divisions, which many of our

DIALOGUE III. 105

writers have fallen into in considering its constituent parts, I will reduce them under those two comprehensive Heads, to which, not only Fortescue and Lord Hale have referred the Laws of England; but all Laws in the world may well enough be classed under, and have been so by antient Writers; I mean *written* and *unwritten*: and these, in our own Constitution, are the *Common Law* and *Statute Law*. When I have explained the characteristic marks of each, you will well enough understand one restriction that must be added to this general division; though if I was to begin with it, it would confound ideas rather than clear them.

By *Common Law*, we mean those general Customs that bind the whole Realm, by an immemorial usage. The time of Memory (as it is called) or the particular

particular æra, that distinguishes the nature of these Laws, is the first year of King Richard the First. Every thing that was matter of general obligation before that time, with all its consequences, is said to be by Common Law; every new obligation induced since that time, must be by some Act of Parliament, the very Letter of which Law is now remaining. What I have further to say of the Common Law, shall be only by way of Comment on this definition.

And from hence you will observe that, tho' indeed the Common Law, in general, is *Lex non scripta*, yet some part of it may be preserved in writing without derogating from the just idea of it. A Custom surely is not altered by writing it. Every thing that does bind the Subject, and is not in Writing, must be in force as Common Law; but

but Common Law itself may be preserved in Writing, provided its usage is immemorial, or the date of that Writing corresponds with the other part of the definition, by being antecedent to the period abovementioned, "as the time of Memory." Any matter of Common Law obligation then, it is evident, may have some evidence preserved, tho' the very text of the Law is not: in Acts of Parliament, the words of the Law are at the first instance put into Writing; that Writing is published, and continues to this day in its original Form.

§. 26. The general matter of Common Law, are concerning the course of Descents (even of the Crown itself) and other Rules of Property; the Prerogative in its utmost extent; the Jurisdiction of Courts; the Practice of those Courts; the Forms of many Oaths;

Oaths; the Rules of expounding Acts of Parliament; various particular Customs; and the general Nature and Punishment of many Crimes; with regard to which *Christianity*, as well as the *Law of Nature*, have ever been considered as part of the Common Law; and flagrant and public violations of either, are under the Censure of that great Court that has been, not improperly, stiled the *Custos Morum* of the Kingdom.

There is a very great connection between Common and Statute Law, tho' they stand sometimes in opposition to each other; the former is never to be forgot in considering the latter, tho' the latter should, in its very terms, be designed to repeal the former. In considering an Act of Parliament, we must often take up the subject matter as it stood at Common Law; but must
always

always borrow rules of construction from thence. I should be premature at present, if I was to insist longer on this point.

§. 27. I said Common Law was what bound the whole Realm, and called it *general Custom*; I added, that it included *various particular Customs*; where these latter prevail, they will interfere and controul a contrary general Custom; they are both Common Law; but the latter are what the Roman Law would call *Privileges* or particular Laws.

And in this place, I may observe, there are many other particular Laws which bind some persons in consequence of some particular relations they stand in; and are not to be considered as general Laws of the Realm, binding on all the Kingdom. They are the same in this respect, as private Acts of Parliament:
in

in which the Subject and Parties are confined. The particular Laws, I mean, are as well the local Customs mentioned, Corporation By-Laws, and College Statutes. In most of these cases, a kind of *smaller Societies* exist in the great one ; these Societies, like all others, are founded in compact, (as Philander has justly observed) and the Members of them, who derive benefits from the connection, must submit to the obligations that it imposes. The Members of these Societies continue, in all respects, (except for the particular purpose of their Institution) in subordination to the Society at large, and are bound by the general Laws of the Realm : the only difference between them and other Subjects is, that the Members of these inferior Communities are bound by some Laws which others are not : because
they

DIALOGUE III. III

they receive advantages exclusive of others. And it is on this ground only, that *Foreigners*, as they are called, that is, those not incorporated, are ever subject to By-laws of a Corporation; because in the instances in which they are bound, a clear benefit arises, and is, in its nature, implied from the transaction: as in the payment of a Port-Duty. It is on the same extensive ground, that *Foreigners*, in a large and proper sense, are bound, during their Residence, by the Laws of this Country, tho' they did not consent to the making of them, because their consent is implied in their residence; and as they have the advantage of the Law in Protection, they must repay it by Obedience.

The particular Customs I mentioned, are innumerable; some of them whimsical and unaccountable. Those of the
greatest

greatest extent are, Gavelkind and Borough-English, as to the descent of Lands; the Customs of London and other Corporations; the various modes and services of Tenure: but Custom has the largest and an almost universal dominion, as to Copyholds and Tythes.

The Common Law admits these special Customs as part of itself, but is cautious in the proof of them, and all built upon them; because it loves “one common Rule.” It is for this reason in ancient Corporations, By-laws must pursue their Custom; in new Corporations, where there can be no Custom, they must be reasonable, and for the benefit of Corporation.

It is for this reason too, that where a Custom is set up in discharge or variation of Ecclesiastical Dues, the Common Law takes the trial of the Custom to itself.

These

These Customs, however, tho' now at variance from the general Law of the Land, were, in former times, in many instances in conformity with it. They are now part of the Common Law; they were then, I may say, the general Common Law itself. Thus the equality of Gavelkind distribution, is much nearer the dictates of Nature, than the present mode of Descent, and till the Conquest was the only one: thus the customary power of devising Lands was no other than what the Common Law allowed to every body; tho' intercepted for a long period, and revived at last by the Stat. of Hen. VIII. Both these modes of acquiring real Property, were checked by the genius of the Norman Policy; tho' the latter, only by favour of Law, has recovered its ancient course.

The Common Law (that I have been speaking of) is sometimes opposed to the Civil Law ; sometimes to Equity ; sometimes to Statute Law : in all three senses, it is to be understood, at present, to represent its most diffusive and general Nature.

§. 28. The Time or the Origin of this Denomination, are not easily discernible. Whether it first was set up in contradistinction to particular Customs, which, however, are included in it ; or to other Foreign Laws, either of the Church or the Empire, in part admitted here ; or to the union of those Provincial Laws, that obtained during the Heptarchy, is not very material : the term itself is well understood to mean, in part, “ the common Rule of Justice in this Kingdom.”

The same great Rule is meant by other descriptions in old Laws ; for the *Lex*

Angliæ,

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Angliæ, and *Lex Terræ* of Magna Charta, and the Statute of Merton, are no other than the Common Law. Lord Hale has observed, other modern Nations have distinguished their municipal Justice by this name: we may go further by observing, the Poets speak “ of the Common Law of “ Greece” itself.

The Origin of the Principles of Common Law, is much more obscure than that of its Etymology. That which, at present, characterises its true genius, must be its apology in this respect; “ it is, in the highest sense, beyond time of Memory:” and the single instance that *Cæsar* mentions of the punishment of one species of Petit Treason, and which still remains, is sufficient to shew the great Antiquity of the Common Law. And it is very probable, there are many parts of it

now remaining, which prevailed at that time.

POLICRITES.

Almost certain, I think ; if *Cæsar* may be an Authority. He has given us the very outlines of “ Excommu-
“ nication,” to enforce an Ecclesiasti-
cal Jurisdiction : and another point of Civil Government, very antient and Fundamental, the “ duty of pri-
“ vate Persons to apprehend Crimi-
“ nals and carry them before a Ma-
“ gistrate.” I consider *Cæsar* as our first Reporter ; you have applied what he had said of Gaul, as if said of Britain : in this you are justified by the event and by his declaration, “ that
“ Gaul copied its discipline from Bri-
“ tain. I have done it with that Li-
berty ; and happy I am that this can-
dour of an enemy has set us out in
such

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such colours. I only hope his account overcame Tully's prejudices; we, in our turn, have as much reason to suppose, Britain had Laws of its own, when four hundred years before Tully wrote, Rome was obliged to send to Athens for its Laws.

EUNOMUS.

You carry your System very far back indeed: not to overthrow it, before it is compleated, I will go on quietly with my Subject. As I must occasionally touch once more on the Common Law, I will leave it at present, and will only say, whoever would be well acquainted with it, must listen to its great expositors, Lord Coke and Lord Hale; particularly the History of it by the latter, worthy of the abilities of that great and excellent man.

§. 29. The other principal head of our Municipal Law, is the Body of *Statutes* or *Acts of Parliament*. This is a very copious subject, tho' little touched on by any of our writers : I shall endeavour to confine my Plan, being afraid of saying too much, rather than too little.

I was much pleased, Philander, when you was explaining the origin of Society, as founded on Compact; and considering Laws, passed by consent, as so many renewals of the original Compact; to think, that instead of a dry acquiescence in the justness of your observation, I should be able to applaud it more effectually, by shewing, that, in reality, as well as in appearance, this *mutual consent* was never so striking as in the English Constitution.

In proof of this assertion, I need only appeal to our manner of passing
Laws,

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Laws, and the declaration in every Law that is passed of the authority from whence it is derived. For who is there, that does but open an Act of Parliament, and understands, from the first page, that every thing contained in it, is “ enacted by the King, by
“ and with the advice of the Lords
“ Spiritual and Temporal, and by the
“ Commons,” but looks on this declaration, as a constant recognition of that consent, which is the parent of all good Laws, and just obligation to obey them? Let us too, in further proof of this assertion, recollect, that whenever either of these parties is wanting, there can be no Law; and, therefore, no obligation of equal force and extent with that of Law.

§. 30. From this concurrence of the three States of the Realm it is, that an Act of Parliament is considered

by Lord Hale, as a kind “of Tri-
“ partite Indenture :” there are other
circumstances (as you will hear pre-
sently) that will justify this analogy,
set up between the form of a Contract
by Deed, and that by an Act of Par-
liament.

From this essential concurrence, in
making of Laws to bind the Persons
and Properties of the Subject, it is
that Patents creating Forfeitures are
void; that Ordinances are distinguished
from Laws; that, in several Instances,
things cannot be done by Proclama-
tions: it is for the same reason, that
Ecclesiastical Canons, unconfirmed by
Parliament, do not bind the Laity;
because the King is the only part of
the Legislature that has a share in
passing them. It is for this reason too,
that the King himself cannot dispense
with

DIALOGUE III. 121

with Laws, because the King alone cannot pass them: and (here as in private Contracts) nothing less than the power that creates the obligation, is sufficient to dissolve it. I think it very clear, from the grounds I set out on, that, in this respect, I speak only the genuine Language of the Constitution; without the least infringement of the Prerogative, which is a just and valuable part of it. This nice subject, I know, has, at times, been obscured by controversy; in this light it admits of none. I will not reason upon it as a doubtful matter. The power of *Pardons*, which some have considered as Dispensations, and from an admission of this sort have argued to the admission of all others, does not apply at all. For this power is one of the antient Prerogatives of the Crown; and so far is it in its nature from

from a dispensation of a Law, that in most cases it is subsequent to a conviction by Law ; and in no case disposes of any right vested in the subject. But I must again repeat it, that this power of the Crown is part of the Common Law ; and, therefore, must, in all cases, stand its ground, as Common Law does, unrepealed by Parliament.

Besides, the notion of a dispensing Power, being so directly against the Constitution ; there are other reasons deduced from the Constitution that cease to make it eligible in itself. The King has his remedy in the first instance : if he with-holds his assent, the Law cannot pass. And in this view, a dispensing Power would be wrong, as rescinding his own Acts ; which is never done even in Grants of the Crown, where no Fraud appears to have been practised in obtaining them. And

yet, in those cases, the Interest is only in the King, and the Grantée; whereas in Acts of Parliament, the whole Kingdom has a concurrent Interest with the King: and they (or their Representatives in Parliament) are makers of the Grant. I must close these observations with acknowledging, that they were never more unnecessary than at present: and if the *Practice* of former times, was never in danger of being mistaken for *Law* in the future, I would not have stopped to make them.

§. 31. I must now proceed a little more particularly to the Form and the matter of these Laws.

This concurrence of the three Estates of the Realm, which is so necessary to the validity of an Act of Parliament; has, however, been applied in some cases (too severely, I will not say, but) too inattentively, as the test of the
genuine

genuine nature of some antient Statutes. "Some of them, it has been said, run more in the Form of a Royal Grant, than a Public Law." Nay, to put the objection in the strongest light, we often meet with the very words, *Rex Statuit*, &c. in the beginning : which, it may be said, look more like the Acts of the Crown, than those of the whole Parliament. Those, who love to argue, may, perhaps, borrow a collateral circumstance in aid of this style of the Law : and tell us, that it was not only the mere Act of the King ; but on *the Petition* likewise (instead of being the joint Act) of the Subject.

Before I give a substantial answer to this objection ; as I imagine you yourself (if you sided with it) will allow, as every body must, from what has been said, that at this day, the national

DIALOGUE III. 125

nal concurrence is really used in passing every Act of Parliament; let us compare the Form used at this day, with those of the antient Acts. In every Act, passed at this day, we read, "It is enacted by the King, by and with the advise of the Lords Spiritual," &c. "*It is enacted by the King*"—if we were to stop here, the present Form would be exactly the same in English, that *Rex Statuit* was in the old Laws. What then is the conclusion? That we must, both in the Ancient and Modern Acts, look out for something further than these words, before their authority is admitted as decisive and incontestable: and at the same time, that these words are no more a diminution of the Legislative Authority of the Acts, in former Reigns, than they are of those passed at this day.

And

And so far from the Petition, exclusive of the words, being a support to Antient Acts ; many Modern Acts (and most Private Acts) have the very Language of *a Petition*, tho' it is not separate as formerly. “ *May it please your Majesty that it may be enacted:*” — then the King answers, “ *and be it enacted*, by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons,” &c. And where, after all, is there any thing, in the Form of a Petition, that derogates from the Freedom and Dignity of the Constitution ? The Royal Assent must be asked : when asked, may be either granted or refused. So that in reality, substance, and effect, *a Petition and Answer* must intervene between the tendering the Bill for the Royal Assent, and the obtaining the Royal Assent,
in

in passing the Bill into a Law. But let us observe, at the same time, the Dignity and Freedom of this Constitution is remarkable in this; that tho' the Royal Assent must be obtained to every Law that is passed, and the King is said to enact; yet that whatever he enacts, must be by the advice and consent of his People; and tho' he may refuse his Assent to a Bill that is tendered, yet he can make no Law that is not first tendered by them: in short, that he may always reject, but can never propose.

Getting rid then of this shadow of an objection; let us come to the substance. And here, consistent with myself, I shall own, that when any Act has not the concurrence of the Parliament, it ceases to be a Law. And in all these, seemingly anomalous Acts, (of which Lord Coke gives many instances in the Princes case) the Parliamentary

liamentary consent, is to this day made the Test of their Authority ; and it will always be found on the face of them, tho' it varies from the precise Form used at present.

Sometimes (as it has been well observed) the assent of the Commons is not mentioned in the Enacting Clause of Acts of Parliament, throughout a whole Reign ; but only in the general Preface of all the several Acts passed at that time : and as the several Branches of the Capitular (if it may be called so) however distinct in their subjects, have “ no break, or even any intervening “ punctuation on the Roll,” they must necessarily have a reference to the Preface which declares their Enacting Authority. Sometimes the legislative consent is described by general words, “ the Authority of Parliament.” Sometimes by an enumeration of the
parti-

particulars of which the Parliament consist. And in these recitals, I remember, Lord Coke says an omission of one Estate is fatal. This variance is still more accountable, when we consider, the Parliament itself was so differently described in different ages: it was called *Concilium magnum*—*Concilium fidele subditorum*—*Curia magna*—*Commune Concilium*—*Affisa generalis*.

The name of *Parliament*, it is said, came in with the Conqueror: and any one, who would infringe the authority of antient Acts of Parliament, since that time; because the assembly which composes it, is so variously described; may with greater reason deny the very being of any thing like a Parliament before that time; because there is no such word to be met with in our antient Annals. But such trivial varia-

K. tions

tions, in the style of the Parliament, or the title of a Law, no more conclude against the authority of either; than the variety of place would, in which one has, at different times, met to compose the other. The assemblage of the States of the Realm, as effectually formed a Parliament in early days, when they met in a Convent, in a Castle, or on a Plain; as when they became fixed at Westminster. We are too good Englishmen, I am sure, to dispute the validity of Magna Charta, because it was passed in a *Meadow*. In such cases, the only weight of the Argument lays in the bare sound of the words. Besides, we too have our collateral circumstances, as well as the objectors. Such Acts existing among the Parliament Rolls, the writ that issued to proclaim them being still extant, and many other nicer particulars
might

DIALOGUE III. 131

might be alledged, if this argument wanted assistance ; and they could be mentioned without speaking too much in the Language of my Profession ; which I promised you I would not ; tho', I fear, I may have partly transgressed already.

§. 32. I do not know how it happened, but I have taken you to view the inside of an Act, before we have surveyed the out-works. But as what I have said, arises from Form, it may be excused ; tho' it is a Form that conceals something of the utmost consequence.

I need not dwell long on other matters of Form, the manner of promulgation, and the different parts of an Act.

Till the Reign of Hen. 7. (I think about the 11th) the Acts of the whole Session were proclaimed and registered

in the County Court, in consequence of a Writ issued to the Sheriff: and any one might read or take copies of them. The Art of Printing being then pretty well established, superseded the old method of Publication. Convenience introduced this usage; tho' the old one is not altogether laid aside: something like the old one being still, in many cases, directed by the Acts themselves. As reading them at Parish Churches, Quarter Sessions, or Assizes.

An Act, however, was in force, before the Proclamation, or, as we may say, in larger terms, independent of it. This was expressly determined in a great Case, in Ed. III. time, cited by Lord Coke, to warrant the position. And Lord Holt, in the latter end of King William's reign, clearly admits (if he has not added to) the doctrine; by saying, that tho' Laws used to be proclaimed,

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proclaimed, “ yet that was but an Act
 “ of Grace.” Nor can it be said this
 was making a Law to be in force be-
 fore it was promulged ; which would be
 contrary to natural Justice : but it was
 the idea of the Constitution, that every
 man in the Kingdom was present at
 the making of the Law, either in per-
 son or by Representation ; and conse-
 quently every one who was not actually
 present, might by the Representative
 be informed of the Laws that were
 made. This idea still continues ; and
 its consequences seem to be the same.
 In fact, many an Act does commence
 before it is printed : and the general
 rule of Law is, that all Acts are in force
 immediately from their being made,
 unless any future time is fixed by the
 Act itself. The observation, however,
 in the Law Books, that “ all Statutes
 “ refer to the first day of the Session,
 “ unless it is provided otherwise in the

“ Statute itself;” I suppose must relate only to the manner of citing them in Pleadings : so as to avoid the nicety and error in distinguishing one day of a Session from another. It surely can never mean that the Law should have a retrospective operation, by being in force the first day of the Session, when most likely it was not then in being ; and define the qualities of human actions by an *ex post facto* provision.

These two Methods (of publication by Proclamation and Printing) considered together, account for our Statute Books going no farther back than Magna Charta, that being the oldest Roll remaining in the Tower. On the other hand, the same consideration shews why many may be in printed Books, that are not extant on Record ; as the first manner of Publication dispersed so many copies ; tho’ the originals were
lost

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lost or destroyed, copies enough might remain to continue them in print.

Printed Acts answer very well the common purposes of information ; but in some cases, it may be necessary to appeal to the Record itself. Where they differ, that will have the same preference as every original has to a copy : and the suspicion of incorrectness, is far from being ideal, as any one will see by looking over the Cotton Records ; and much later instances.

I proceed now, in a few words, to the title and the component parts of the Act : and their relative force in constructions.

The title is now a kind of epitome of the Act, containing the general subject of it ; and the Act itself is denoted and cited by the Reign of the King. The ancient Statutes were, from some particulars in their Form, called

Charters or Ordinances—some took their name from the place where the Parliament was held, as it was moveable in those days: as the Statute of Merton, Gloucester, Winton, Westminster, &c. — Some are generally known from the initial words, as the Statute of *Quia emptores Terrarum*, and of *Circumspecté agatis*. The generality from the Subject, as the Stat. of Fines, the Stat. of Wills, the Stat. of Frauds and Perjuries. The Romans named their Laws (you know) either from the proposer, as *Lex Falcidia*, *Lex Pompeia*, *Lex Cornelia*: sometimes from the Tribunes during whose administration the Law passed, (which comes nearest to ours) as the *Lex-Didia-Licinia*; or from the Subject, as the *Lex Agraria*. From the proposer we have none: it would little suit the nature of our Government, tho' it was well

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well fitted to theirs. I know but of two instances of Acts known from Persons; *Poyning's Law*, and the *Conventry Act*; and they are with far different views. I own, it is a matter of curiosity to know the particular occasion of an Act; or the first proposer of a Bill, which is afterwards enacted into a Law: tho' neither can be known from the Law itself. Considered as Laws, they are all alike the creatures of public Authority; and "*as in-
distinct as water is in water*."^a But these Laws, like Rivers which, when they fall into the Sea, become a part of that collection that invests the globe, are yet often to be traced to some private and far distant source; were once, perhaps, the first hints of a single person, tho' private wisdom at length is undistinguished and lost in public authority. And thus we may

^a Shak. Anton. and Cleop.

revere the memory of those, whom tradition hands down as the proposers of any Law; tho' we do not (as the Romans did) name Laws after them, or embellish their monuments with the *Legum Latarum tituli*.

The subjects of our Acts are often of a miscellaneous nature; and such are known in practise by the name of *Hotchpot* Acts. This practise, it seems, was begun among the Romans, till prohibited by the *Lex-Cæcilia-Didia*, which Tully so freely censures, *Quæ legis sententia nisi hæc, ne populo necesse sit in conjunctis rebus complurimis aut id quod nolit accipere, aut id quod velit repudiare?* This objection is prevented in our Laws by the manner of passing and promulging them. And with regard to prosecutions, where it would have most weight, each clause is considered as a distinct Law; and therefore, in this respect,
“ He

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“ He that offends in one point may
“ not be guilty of the whole Law,”
and consequently not liable to the penalties of the whole.

§. 33. The formal component parts of an Act, are the “ Preamble, Enacting Clauses and Proviso’s.” The *Title*, our books say, is no part of an Act, which made me mention it before I came to these.

This resolution of an Act into its component parts, is material in practice ; because in construction these parts may either explain each other, when consistent, or controul when opposite ; and greatly alter a construction founded on particular clauses only.

The *Preamble* (we are told by Lord Coke) is a key to open the meaning of the makers of the Law ; and yet later authorities have been very far from considering it as the master-key ; which
it

it cannot be, unless the Preamble was in all cases co-extensive with the Purview or Body of the Act. And it seems to be determined with the utmost propriety, that the Preamble shall not restrain the operation of the Enacting Clause. The intent of the Preamble is to shew the reason of the Law; but there may be many very good reasons, not expressed or appearing, *ex post Facto*, to shew the utility of the Law, besides the particular mischief or occasion of the Law assigned in the Preamble. They will be so many justifications of the Legislature's wisdom and foresight.

The giving any reason for a Law, is a kind of indulgence; it is painting Authority in the mild form of Persuasion: so your friend Tully has it — *hoc quoque legis putavit esse, persuadere aliquid, non omnia vi ac minis cogere.*

But

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But it would be greatly abusing this indulgence of the Legislature, to turn it against itself, by mistaking a command for mere advice.

Whoever is at the pains of looking back on the old Acts of Parliament, will meet with some Preambles of a very singular nature. I remember one in an Act of Ed. 6. embellished with all the flowers of a poetical simile; another in Hen. VIII. envenomed with the acrimony of a Libel. So that if a Preamble in every case is to be considered as a key to the Act, it will, in some instances, be of as much use “in opening the meaning of the Act,” as the key of that tea-chest would be to the door of the House.

The *Enacting Clause* being the operative, vital part of the Law, must be considered, when we are quite clear of Forms.

The

The *Proviso's* or Savings of the Act, are (as their name implies) exceptions of particular cases, from the generality of the Law.

I will make only two observations on these formal parts of a Law: 1. That they are all so many additional forms, unknown to antient Laws. No Act, it is said, had a Title, of the present kind, 'till 11 Hen. VII. Preambles begun to be constant about the time of Ed. III. and Proviso's are of no very long date. 2. That an Act of Parliament thus analysed into its parts, is, in this respect also, like a Deed; the Premises correspond with the Preamble; the Habendum, Clauses of Rent, are, we may say, its enacting part; and the Condition and Exceptions of a Deed, are like the Proviso's of an Act. Nor is the pursuit of this analogy altogether fanciful, the rules

of construction having often the same agreement as the parts themselves.

Thus an implication only in the Premises shall no more controul the Habendum, than a particular Preamble shall a general Enacting Clause; and a Condition or Proviso repugnant to a Deed or an Act, is equally void. In a Deed, as well as in an Act of Parliament, Form has been the growth of time: whoever compares the parts of a Deed, as modelled in the first institute, with the antient Deeds in the *Formulare Anglicanum*, and other books of antiquity, will see the novelty of many of those parts; and admire the simplicity of our Ancestors. There is one thing, which, perhaps, you will be surprized at, and after all forms mentioned, think an Act is very deficient in, that *no Act of Parliament*, I mean the original Roll, *has any stops or paragraphs*: so that any argument
drawn

drawn from the influence the stops have on the sense ; or any alteration in the legislature's meaning, occasioned by dividing Clauses ; falls to the ground, and is to be imputed to the invention or mistake of the Printer.

§. 34. I am now at length come to the *subjects*, and other material qualities, of Acts of Parliament, and shall then conclude with some of the most general rules of construction ; as to which, I must remind *Policrites* beforehand, that my engagement with you, *Philander*, discards all those subtleties that have crept into our Law Books, about pleading and reciting them : much less shall I be expected, even in the compass of these observations, to be as full and precise in discourse, as I would in an express treatise on this subject.

The most popular division of Acts of Parliament, I can think of, arises
5 from

from considering them as public or private ; temporary or perpetual ; remedial or explanatory ; in affirmance or in derogation of Common Law.

The distinction of Acts, as *Public or Private*, regards rather the difference of the object, than the extent of their obligation. And it principally affects their notoriety, evidence, and manner of being recorded. That is to say, these are not printed in the Statute Book, not the immediate objects of judicial knowledge, nor inrolled in Chancery as the Public are. But this distinction introduces no inequality with respect to their binding power. On the other hand, tho' some Acts do, in reality, extend their obligations, much further than others ; yet, upon that account, they make no part of the distinction here laid down. As for instance, an Act that binds *Ireland*

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or

or the *Plantations*, and another that binds *England* only, are equally public Acts.

Acts that immediately concern all the people, are said to be public Acts: and, therefore, those Acts that relate only to particular places, and to particular persons in a private capacity, or to one species of the Community in a Politic capacity, are, in their nature, Private Acts of Parliament. This definition, which I have formerly collected, not without some pains, from the infinite variety of cases in our Books, will, I hope, prove adequate and comprehensive. You will easily understand by it, that some Acts as to particular clauses, may be both public and private. As the Statute of King James, that disables all Popish Recusants from presenting to Livings, is a public Act; yet the clause in it,
that

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that gives their Presentations to the Universities respectively, is in its nature private: and must be pleaded or found in order to be taken notice of by a Court of Justice. So the Clause in the Act, passed the other day, for securing the property of Mr. *Hogarth's* prints to his Widow, it is evident, is private; but the Act itself, made to amend and effectuate the Act of the late King for the encouragement of the Arts of Designing and Engraving in general, is in its very nature, a public Act.

The distinction itself, between public and private Acts, was introduced in the reign of Richard the Third: private Acts being then first ranged by themselves. At this day, many Acts private in their nature, are expressly declared to be public; which circumstance communicates to them the judicial consequen-

ces abovementioned ; but does not give them a place in the Statute Book.

§. 35. The next light in which I proposed to view Statutes, was as to their duration ; they being either *perpetual* or *temporary*. Generally speaking, an Act, when no time is fixed for its commencement, is in force as soon as it is passed ; and when its duration is not limited, is in its nature perpetual. So that it must either expire in point of time, or be repealed by a subsequent Act, before its obligation can be discharged. It is plain then, Time alone, that weakens most things, will, of itself, not affect an Act of Parliament. Every body knows there is a Statute passed in the reign of Ed. III. as fresh in its obligation, as if it was passed at this day. Nor will bare want of usage, any more than length of time, be able to repeal an Act of Parliament. Time,
and

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and the Manners of the Age, may change the Situation of things, and the objects of an Act may vanish : and then the provision of the Law must cease. But while the objects of an Act continue, the Act itself remains in force.

And this, it may be observed, is the case with the Common Law itself. Many of the old modes of proceeding are disused, because others, more suited to the times, are come into their room : but the others are not abolished ; because immemorial usage, uncontradicted by Parliament, remains Common Law. Thus (Policrites will remember) most of the real Writs have fallen into disuse by the practice of Ejectments, the great use of Personal Actions, and practice on Motions. Thus Villenage, Trial by Battle, Wager of Law, and Attaints, have long been

disused ; but were never, that I know of, abolished by Law.

§. 36. The third distinction I mentioned was that of Statutes considered as *Remedial* or *Explanatory* : either as they are introductive of a new Law, or declare, explain, and confirm an old one. This distinction must be confined to Statutes, compared with one another ; or it would anticipate what I have next to observe. I need not enlarge upon it, at present, because it is easily understood with its consequences.

§. 37. The capital distinction, which I have reserved till last, is either as Statutes are *in Affirmance*, or *in Derogation of Common Law*. It is this distinction that furnishes many rules of construction.

Many of the old Statutes (it is well known) are no other than declarations
of

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of the Common Law. Such are the great Charter, the Declaration of Rights, 1 Will. III. with many of the Statutes in Ed. I. reign; and numberless others, both Antient and Modern. A Statute that is affirmative only, does not take away Common Law; the Common Law, therefore, notwithstanding a new remedy given by Parliament, still remains, unless there is an express or implied negative: and the right in a course of Justice may be asserted, either in the beaten track of the Common Law, or the new Parliamentary Mode of Proceeding. But affirmative words in an Act of Parliament, do always repeal any former Provision or Mode of Proceeding in a former Statute, where they are in their nature inconsistent.

There is that great simplicity and plainness in the Common Law, that

Lord Coke has gone so far as to assert, (and Lord Bacon nearly seconds him in observing) that. “ he never knew
“ two questions arise merely upon
“ Common Law ; but that they were
“ mostly owing to Statutes ill-penned
“ and overladen with Proviso’s.” This observation, even at the time it was made, does not seem altogether just, in ascribing the multiplicity of questions to the inaccuracy of the Statute Law : for some that have been penned in the plainest language, have been productive of as much controversy as any. The truth is, it is not in the province of language, or human penetration, to exclude doubts, ambiguities, or evasions ; where people think it their interest to make them. A more curious and endearing observation to recommend the Common Law, the same author has given us ; when he says,
that

that tho' in some points the Common Law has been altered by Acts of Parliament ; yet in revolution of time, the Common Law has, in those very points, been restored to avoid inconvenience.

§. 38. These observations, you will allow, extremely well justify the great rule in our Books, that makes the Common Law the basis of construction in all cases whatever : that supposes the Common Law to subsist, where it is not expressly or virtually repealed : and by these means makes one consistent harmonious System of the whole Law. Another rule, which is nearly of the same import, is, that all Statutes, made in *pari materiâ*, shall be taken together in construction. Thus the Bankrupt Laws, the Poor Laws, the Game Laws, are respectively considered as making each so many separate Systems.

Many

Many rules of construction are derived from the distinctions I have mentioned ; but are too minute and practical, to trouble you with.

The only great and general rule of construction, I shall add, is, that the sense of every Act, and every Clause in it, must arise from an accurate review of the whole ; and from the spirit rather than the bare Letter of the Law. When the meaning of the Law corrects, restrains, or enlarges the words of it, we call it an equitable construction. And this is an Equity that has been known in all ages, and is almost the only one that Courts of Law are acquainted with. It has been touched on in many of our Law Books ; but no where better than in Plowden. The meaning of an Act, he calls the " Soul of the Law ;" and compares an Act of Parliament to a Nut : (I see
you

you laugh at the good old Sage : he means a Nut, *not in size but in solidity*) of this Nut, the Sense is the *Kernel* ; the Words are only the *Husk or Shell*.

The only authentic channels of Interpretation are the Judicial determinations of the Courts at Westminster. Concerning which I shall be under a necessity of saying a good deal hereafter, as I am apprehensive what I have been saying, may go for nothing, if their nature is not more thoroughly explained than I have ever yet seen it. There are other helps to the construction of Acts, of private use rather than of public authority. Such are those pieces, formerly in great vogue, called “ Readings ; ” and such too, in many cases, is the history and manners of the times.

§. 39. After this particular account, I shall make but two observations.

I. Con-

1. Concerning the objects of our Laws.
2. Concerning their Sanctions.

It is extremely clear any thing may be enacted by the Laws of a Society, that is not contrary to natural Justice. And yet we shall find many Governments are more minute in explaining and defending, by Law, Political Rights, than the Rights of Nature. The truth is, the former are the mere creatures of positive Laws; the Rights themselves are created: in the other, positive Laws only give additional Sanctions. This is remarkably true in our own Laws.

Imperfect natural Rights are very little the object of Laws. The *Athenian* Law punished idleness at large. Our own, only as it affects Society by example, or in its consequence; so of Drunkenness, in the bare commission, and other vices, that affect principally
 4 a man's

a man's self. The Athenian and the Roman Law both punished Ingratitude: this is a kind of Law unknown in our own State. I wish we could say as the Spartan, in Plutarch, did of Parricide; *we have no Law against it, because we have no such thing*: but tho' the thing itself is too well known in every Country; with good reason, we have no Law against it: for a Law of this kind, must leave every thing to construction. In all crimes, the guilt arises from the motive of acting; but the motives, in these cases, could not so easily be inferred from the fact.

Sumptuary Laws, as they are called, make a large head in some Systems. Our own are very sparing in this respect: formerly there were restraints of excess in apparel, diet, and retinues. And yet, however agreeable to reason and morality, such prohibitions are, in certain

certain circumstances ; it seems, better in a state like our own, to leave them to Reason, than restrain them by Law : because such Laws, by restraining Commerce, introduce greater public inconveniences than they can prevent by restraining, in particular instances, the excesses that may be the consequence of Commerce.

Formerly, Flattery and Lying were punishable : but they carry their own punishment with them, by contempt and incredulity for the future. In all these instances, *Religion* much better supplies the place of Law : it reaches the heart, where the Law can only regulate the actions ; and those actions only that more immediately affect Society. It has the Rewards and Punishments of *another World* for its Sanctions, when Human Laws can have only those of *this*. Happy, therefore,

fore, it is for a Nation, when Religion co-operates with Law ; and where, as with us, it is of the most excellent kind ; and is established by Law, at the same time it strengthens and enforces the Law itself.

§. 40. And without the aid of Religion, our Law (as indeed all positive Laws) would want one of its principal Sanctions. *Rewards and Punishments* have been by many Writers on Natural Law, considered as the necessary guardians even of Laws themselves, as they are of Society. And yet, Positive Laws are, in themselves, very deficient in one of these Sanctions, tho' large enough in the other.

The necessity of Penalties is so obvious, that no Law is without them : and the more free the Government is, the more exact will the Law be in defining them. Our own Government
is

is remarkably precise ; the Punishment for *Crimes*, is, in most cases, as fixed as the ideas of Crimes themselves. And the Punishment of *Misdemeanors*, is rather discretionary, as to its quantity, than arbitrary in its nature. And even in the old Statutes, where it is Enacted, that an Offender shall be “ punished at the King’s Pleasure ;” the natural import of the expression has been restrained in Construction, to mean the Pleasure of the King, as exercised, in his Courts of Justice, by the sound discretion of his Judges. And this discretionary Power, as to the quantity of the Punishment, in opposition to a Sentence fixed by Law, seems best left to a Court, in cases of Misdemeanors, for two reasons ; to adjust the Punishment to the circumstances of the Offence ; and the quality of the Offender.

But

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But *Rewards*, which several writers have considered as another inseparable Sanction of Laws, are very little known in our system. There is, indeed, an implied Sanction, which, tho' greater than any positive one, is not what such writers would mean; that is, the protection and immunity of Civil Government, the consequence of its Obedience; this, it is true, belongs to all Laws, but is found, in Practice, to be too weak to answer the notions of a Sanction: as weak as the natural Sanctions of Virtue and Vice, arising from the happy consequences of the one; or the ill consequences of the other, to the health, fortune and tranquility of Moral Agents.

But notwithstanding this weakness in the influence of implied Sanctions, Positive Rewards for the obedience of Laws, are, in very few cases, provided

M

by

by our Laws: principally (I think) in those extraordinary cases, “ where the
 “ execution of the Law creates parti-
 “ cular difficulties, and at the same
 “ time, the neglect of the Law could
 “ not be punished.” For instance, the Law gives a Reward to those who apprehend a Highwayman, or a Penalty to an Informer. Every man, by his connection with Society, is obliged, by the fundamental Contract, I may say, to bring a Rogue to Justice; Pollicrites has shewed, from *Cæsar*, that our Ancestors had an early notion of this duty: and made a Law for it. But every body knows, the difficulty and danger of doing it would, in such cases, over-balance the natural motives of Obedience: and many an opportunity of doing it might be lost; without any evidence for the Law to impute to a particular neglect. It is, therefore,

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therefore, prudent of the Law to encourage its own execution, in such extraordinary and unequal circumstances. What has been hitherto said of Rewards, must be understood of them considered as they are one of the Sanctions of Laws: and with us there are very few of this kind. It will, indeed, be some satisfaction to think they are but few, if there is any truth in the celebrated Montesquieu's reflection, "that great
" Rewards are a sign of the decline
" of the Government; because they
" are a proof of its principles being
" corrupted." But in all Governments it is proper there should be a Power lodged somewhere, of rewarding extraordinary Services to the State. That Power, with us, is left to the executive part of Government, the Crown: (unless we should except Rewards proposed by one or two Acts of Parlia-

ment for some discoveries in Science). And whether Rewards for public services, appear in the shape of Ribbons, Peerages, or Pensions, they all flow from the extraordinary Grace of the Crown, very properly stiled, in our Books, the Fountain of Honour. I have now done with the principal Heads of our Law.

§. 41. I am next to mention Judicial Records, which, I before hinted, were the Evidence of Common Law, and the Exposition of Acts of Parliament. Policrites will observe I have not spoken in conformity to many of our writers, who consider these as one branch of Law: which in themselves they are not, but refer to a preceding Law, and bind only the Parties, in each particular case, as an authoritative exposition of the Law; whether the case arises on the Common Law,
or

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or on an Act of Parliament. For no one Person's case determined, tho' its circumstances should exactly concur, is so directly binding upon another, as to subject him to Punishment, for not obeying or acting according to it. But as it is probable succeeding Judges (bound on Oath to determine according to Law) will give the same Exposition of the Law, where similar circumstances do occur; that determination in one person's case, may in its consequence be a Punishment if not obeyed by another: by putting him to the expence of contesting a matter already settled. And, therefore, it would have been but prudent, where the circumstances are exactly the same, to have acquiesced in a former determination, because that determination has made the *Law known*, in such particular circumstances

This account of Judicial Decisions, I think, agrees with Lord Hale's meaning—He, it is true, ranks *Judicial Decisions* as one *Constituent* of the Common Law; but soon after adds, that though they do bind as a Law between the Parties, in a particular case in question, till reversed by Error or Attaint, yet they *do not make a Law*, properly so called—and tho' such Decisions are less than a Law, yet they are greater evidence of it, than the opinion of any private persons, as such, whatsoever.

§. 42. This account, tho' it may have detracted from them, in the opinion of some, will be sufficient to raise them in the opinion of others; who dispute both the authority and the use of Judicial Precedents. I wish, for the Writers sake, such notions had place only in works of pure Fiction, such

as

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as *Swift's voyages*; for Truth will not easily be laughed out of countenance: but they have been attacked with more severity, under the plausible colour of cool Argument. Some object to the use of any precedents whatever: others to the uncertainty and contradiction of them.

The first are answered by what has been already said of the nature of Judicial Decisions: "that they
"are Expositions of the Law, as
"it stands when the case happens." It is the business of Judges *jus dicere*, not *jus dare*. And why should not similar Cases have similar Expositions?

There was a time, undoubtedly, when these Precedents were first formed: and the Decision was simply founded on the light of Reason and the circumstances of the case. We scarce

need be told by Spelman, " that in
 " early days the Sages of the Law
 " judged many things *ex æquo et bona* ;"
 and their Judgment afterwards, as the
 Responsa Prudentium among the Ro-
 mans, and the Theodosian Code, be-
 came Precedents of Law to Posterity.
 Cases will often still occur unlike any
 determined, and are, therefore, with-
 out Precedent ; others will happen
 like these, and then these will be the
 first Precedents in their turn. But
 tho' every Precedent must have a time
 to begin, that Chief Justice argued
 very ill, who admitted a Jury, not
 Freeholders, in a capital case, and said,
why may we not make Precedents as
well as those that went before us. Be-
 cause his Precedent was so far from
 being new, or *ex æquo et bono*, that it
 was contrary to settled Law, from the
 first age of the Constitution. The
 Archbishop

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Archbishop too, who would have advanced the King's Proclamations into Laws, on the maxim of all Precedents having a time to begin, argued as ill ; and was told so with spirit, in King *James's* presence. And this gives me an opportunity of overthrowing a notion that has crept into our Books, that, when a case arises that is without Precedent, the bare want of Precedent is a great argument of its being against Law.

That opinion is now disregarded : every day new cases arise, and are determined on their own reasons.

Indeed the contrary would be to suppose, 1. That Reason had nothing to do with Law. 2. That a Right might exist without a Remedy to support it. The true Limitation, I take it, is this : in a case, that must have daily happened, the want of Precedent is a great

great argument; but in cases, where the circumstances could hardly exist, it is none at all.

The Determination will then be, as Spelman says, *ex æquo et bono*; and if a case, similar in point of circumstances, does occur hereafter, that case will, if remembered, be made use of as a Precedent.

§. 43. Those who object to the uncertainty of Precedents, founding their objection on some appearances of truth, are better intitled to be heard; but there is some fallacy in this way of arguing. They take Judicial Decisions, and Printed Cases, as equivalent and synonymous; which, it may be easily shewed, are by no means the same; and, yet, these latter are the great source of the uncertainty and contradiction complained of.

Judicial

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Judicial Decisions are properly the Precedents : and Records alone are the proper Warrants of their authority. Printed Cases, as the channel of communicating these decisions, whatever use they have in other respects, have no internal authority, but as supposed copies of a decision on record. But printed Cases in Reports, tho' inferior in authenticity to Records, have yet many advantages : 1. That in a short compass they contain the most important decisions of many ages : the Records are so numerous, that it is impossible and useless to transcribe, read, or consult them for any time. 2. The Records are the bare naked Decisions, and contain only the formal entries of Pleadings and Judgments ; whereas the Reports contain, in many important cases, the arguments offered to the Court on both sides ; and the reasons which deter-
mined

mined the opinion of the Court on that side on which the resolution turned.

An accurate account of cases of weight and difficulty published by persons, from what arose within their own experience, can want no recommendation with the Profession. And the *good old Judge*, whom I have often heard condemn from the Bench, as he has since done in print, many of those crude indigested performances, affecting to be called Reports, which were, perhaps, nothing else than, as he expresses himself, “the rummage of dead men’s papers, or the first essays of young authors,” has yet allowed a good Reporter to be a *real benefactor to the Public*. He himself (if considered in that light only) has been a great one.

But many Reports may be considered in another point of view, and rather

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out of the direct track of the profession ; as many of the more modern contain excellent pieces of legal reasoning, and which are capable of entertaining any one, of a liberal education, with the smallest insight into such subjects. Such are particularly Sir B. Shower's cases in Parliament, and those of Vaughan and Peere Williams. No doubt of it, Reports, like all copies, must be greatly inferior to what the Originals were. We are even told, that many of Tully's orations are, in this respect, in nature of Reports ; at least abstracts, rather than copies, of what he spoke upon the occasion. Lord Bacon thought the method of reporting in his time, too jejune and imperfect ; he particularly censures that of Sir Ed. Coke, as too compendious a form of reporting the resolutions of the

the Court ; and not sufficiently “ tracing out a form of argument :” it was this consideration that induced him to leave us those excellent specimens of his own ; which method has been, in many instances, followed in later times.

§. 44. The printed Reports exist in a continued series from Ed. II. time to the present : extremely numerous and defective. Originally they were collected and published “ annually,” by persons appointed by the King, and thence acquired the name of “ year Books.” This method was attempted to be revived in the reign of King James : and there is an ordinance to be met with dated the 15th year of his reign, directed to Lord Verulam (Bacon) and Sir Julius Cæsar, vesting in them the appointment of two persons, with a salary of 100l. each, and other particulars,

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particulars, as may be seen at length in the Record in Rymer's collection. Lord Bacon seems to allude to this in his proposals for the amendment of the Law: and this likewise explains some passages in his Letters, lately published. I do not find this method continued long: Hetley's Reports, however, from the title, seems to have been taken in virtue of this appointment.

The want of this provision, if it is at all to be regretted, is less so, since that time: there being many co-temporary Reports, that give a tolerable account of transactions in Westminster-Hall, from that period. The general authority of Reports is now derived from the *Imprimatur* affixed to its title-page. This manner of stamping an authority on Law Books, (tho' the practice of licensing was derived from the Inquisition, and applied here first

to books of Religion) seems to have come in as a succedaneum to the appointment of Reporters. It was first done by the Lord Chancellor alone. But about the latter end of Car. II. time, by the twelve Judges. The Imprimatur is usually preceded by a testimonial on personal knowledge of the Reporter's general character in his Profession; but that (like other general characters) neither supposes the work free from faults, nor excuses what is faulty; for after all, (as I have said) the Report of one particular case, stands its ground only as it is supposed agreeable to the Record: wherever it appears to vary in substance, it loses all its authority.

§. 45. The essentials of a case well reported, seem to be, 1. A true state of the facts. 2. The true point before the Court. 3. The manner in which
it

it came before the Court. 4. The true Determination. 5. The Name and Date.

You sometimes hear of Manuscript Reports, which have their use, tho' they rest only in private hands. 1. Because they are chiefly Cases within time of memory. 2. Because they serve as a Memorandum to point out the Record of a Case, the determination of which might otherwise have laid altogether dormant.

§. 46. I now come to answer the objection to the uncertainty and contradiction of Precedents. And it may be observed, 1. That this uncertainty is occasioned chiefly by the defect of Reports; and arguing from cases unlike, as if they were alike. 2. I shall admit that, sometimes, the same points have been long agitated, and remained unsettled. And then shall take occasion to mention a word of Precedents *sub silentio*.

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The greatest and almost general defect of Reports, is the want of a just and full *State of the Case*. The Law, in every case, must arise from an entire attention to the Facts, which are the ingredients of the Case. And it will unavoidably happen, that those who report Cases, which they barely hear, and have no concern in, must often omit many very material circumstances of the Case; and sometimes insert others that are not material: the Facts being so complicated, that, exclusive of other disadvantages, no attention can master them all at once. Hence it will happen, that such Cases must be reported in a more loose and general manner, than the Facts admitted; and by those means, the special grounds of the determination not being known, the determination

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tion will be cited, as *a Case in point*, hereafter to other Cases (if the whole was known) very unlike. This happens most frequently in opinions on *Devifes* and *Settlements*. Lord Coke has gone so far as to say, no Case is exactly like another in all its circumstances. And yet, a Case determined, may be made use of as a Precedent, without being exactly alike in all its circumstances: the material circumstances may be the same; or they may be made use of as far as they go.

It is partly owing to the variety of circumstances, in different Cases, and at the same time confounding different Cases unlike, that a few words in an Act of Parliament, have often furnished so many, and often seemingly opposite, determinations. Of which scarce two lines, in the *Stat. of Frauds and Perjury*, and as many in the *Stat. of Will. III.* on *hiring and serving for a year*, both

of them penned in the plainest words the language admits of, have furnished, I may say, enough for a folio volume.

2. I must admit, indeed, some points were for a long time altogether unsettled, and as it were fluctuated between contrary opinions of Courts. Such as, whether in case of a Legacy, and an undevised Surplus, the Executor or the next of kin, is entitled to that Surplus. Whether reversionary Terms for raising portions should be sold during the Jointress's life. Whether an Estate to A for life, Remainder to the heirs of his body, gives an Estate Tail to A or not?

Such questions, you see, concern rules of Property; and it is of the utmost consequence, that points of that nature, once determined, should be acquiesced in: for the inconvenience of shaking settled determinations, is much greater to the kingdom in general, than

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than the impropriety of any former original determination can be to the Parties. Lord Macclesfield used to call it removing Land Marks. Indeed, a point of Law settled answers Virgil's

Limes agro positus, litem ut discerneret arvis.

It is in this view too, that Courts have said; It is often of little consequence, how a point is determined at first, so it is but adhered to: then the Law will be known; and the inconvenience, by being foreseen, may be avoided.

After all, some allowance is due to human infirmities; men, as men, will differ in opinion. Every man cannot be right; but every man must be saved by his own conscience. The greatest men we have had have been most forward to make these apologies for human nature, tho' they have least need of them. *Policrites* will remember, what Chief Justice Vaughan, in *Bushel's case*, and Lord Nottingham in

his own famous argument, have so finely said to this purpose. And what those who now preside are more fond of owning with much less occasion.

§. 47. Besides what has been said of Precedents, you will sometimes hear of *Precedents sub silentio*: but these are opposed to *Judicial Precedents*, and mean nothing more than a silent, uniform course of practice, uninterrupted, but at the same time unsupported by legal Decisions. Where Practice is uniform, and not contrary to Law, it will have great weight; so will the single opinion of eminent men in the Profession. And these are ranked among Lord Coke's topics of Legal Reasoning: and I remember were greatly relied on, upon a late occasion, in the exposition of the Statute of Uses relating to an Infant's barring herself of Dower.

But

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But if mere Practice, or Precedents *sub silentio*, were to prevail against Law, then, as has been justly said, “ Clerks in an office would make “ Law ;” and would have it in their power to repeal Laws in being.

§. 48. If, from what has been said, I was to form a *Scale*, by which the Authority of Legal Precedents might be measured ; the Precedents *sub silentio* would obtain the lowest place : next above these (but so much above these, that, in comparison, the first are almost like the freezing point in the Thermometer) I consider an opinion of a single Judge at nisi prius, on a point directly in question : then, higher up the Scale, the Determination of any one Court in Westminster-Hall : much higher than this, that very Determination confirmed by another Court on Writ of Error : and the highest of all, the

Determination of the same case, on a Writ of Error in the House of Lords. This last has the highest place imaginable in the Scale of Judicature; and affords evidence of Common Law, or of the Exposition of an Act of Parliament, no way inferior, in point of authenticity, to the express positive text of an Act of Parliament itself.

Thus have I finished on this head.

PHILANDER.

§. 49. And you have reconciled me much to a part of the Law, which I, who am a stranger to the subtleties of your Schools, have ever looked on as of the very essence of Cavil: but I still have some difficulties, which to one so far a convert, you may easily clear. Admitting an uniformity and adherence to Precedents are observed in one Court; how is it that a Court
of

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of Equity is set in contradiction to a Court of Law? That points solemnly settled in a Court of Law below, (as I think you call it) shall be reversed on appeal to another Court of Law? Nay, that even in the same Court, the effect of a trial, by Jury, shall be overturned by matters arising after it?

EUNOMUS.

Upon my word you have drawn up your forces in great order : but you are not aware, how much time it will take to go through even this mock Campaign. I must deal fairly with you ; you must attend to the different Provinces of different Courts. In what manner they assist, controul or depend on each other. You must be led too in a beaten track about Juries, to settle the meaning of what may be said in answer to what you urge.

PHI-

PHILANDER.

We have a great part of the morning before us; take it all; especially as you have promised me satisfaction on a subject, which always fires the blood in my veins; on circumstances I often pitied the want of, in other nations abroad; and am sorry to see any diminution of at home: I mean, what, from my earliest knowledge, I have been taught to revere as an Englishman's Birth Right, *Trial by Jury*.

EUNOMUS.

§. 50. I will begin then with that: and will attempt to shew you, that this form of trial has, in the course of time, been greatly improved, nay, even improved in those instances in which you seem to think it impaired.

I will

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I will not expatiate on the antiquity or excellence of its original. As to both, it is sufficient to say, "*Caput inter nubila condit*," its original is obscure; but it is the noblest form of policy that was ever invented on Earth, and (may I add?) comes nearest the impartiality of Heaven. I do not know any Country that pretends, in the least, to share it with us, except Sweden; from whence we are supposed to have borrowed it: which notion, entertained by some of our Travellers, is refuted by two observations: 1. That their plan of Juries disgraces ours by comparison. 2. That Juries existed in England, long before England probably had any knowledge of Sweden: before those great inundations of the populous North, as it were, deluged this Western world.

But

But excellent as this form of trial is in England, as it consists of men, it cannot pretend to absolute Perfection. Bodies of men, like individuals that compose them, are liable to be influenced : a Borough and a Jury may both be occasionally corrupted ; but, in the nature of things, numbers are a security ; and in the case before us, twelve are more likely to form a right Judgment of Facts, and to give it with impartiality, than one man.

The probability is still more on the side of truth from this quarter, when it is considered, what pains our Ancestors have taken, from age to age, to reform the model itself ; as well to guard it from every natural bias, as to give it every possible advantage. I meddle not, at present, with those incapacities that Reason points out, and the Common Law has ever adopted : such

as proceed from a defect of the understanding or depravity of the will. The positive qualifications are more within our view ; because these have varied greatly in course of time ; as it is, indeed, of the genius of positive Laws, to conform to the convenience of the times.

The old Statutes required Jurors, in general terms, to be “ next neighbours and most sufficient.” It would have been impossible, without that nice division of Lands into Counties, Hundreds, and Villages, and at the same time a free distribution of landed Property, to have found twelve men equally qualified, in point of vicinity, and of freehold Estate. Those two qualifications, however, so excellently fitted to the office of Juror in early times, and so closely connected, have now parted at the greatest distance ;

tance; the vicinity reduced, in common cases, to a shadow; the qualification, in point of interest, swelled to what would have been a Prince's income in those days: that is, *Philander*, in the idea of those who are governed by words; for in reality, I think, the respective times being considered, the qualification may be considered, in both cases, to be pretty near on the same foot. I will just deduce the alterations in their several periods; and will then remark the consequence of the alterations.

The provision that Jurors should be *next neighbours*, tho' a favourite caution of the Common Law, rested on a very vague description; and in time was found very inconvenient. The Stat. of Hen. VIII. brought it down to six of the same Hundred, where the fact arose; another Act in Q. Eliz. time reduced it to two Hundredors;

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the Stat. of Q. Anne makes an end of all Hundredors, and requires the Venire to be awarded from the body of the County, except in certain criminal cases: tho' by construction, the practice *sub silentio*, I was speaking of, was soon set up as a reason for keeping the Jury, in all Crown Prosecutions, still within the pale of the same Hundred.

You see then, how this qualification has given way: and greatly to the public advantage, in opening a more free course of Justice; as Jurors may much more easily be had from a County, than an Hundred: if the part is not equal to the whole, as I suppose you allow it is not. And with respect to the advantage arising from the knowledge of Places or Facts in question, tho' at first sight that may be peculiar to those who are literally "next neighbours;" the answer to that is, 1. That the no-
tion

tion of a *View*, (that has long been so well known) is, with regard to the knowledge of Places, a fair equivalent to the subject, in lieu of the provision of Vicinage at Common Law. And *six who were on the View*, who must be at the Trial, will be of much more service, than *six barely of the Hundred* would be. 2. But even still by Lot, there may be some of those who are literally next neighbours.

And by relaxing the restraint (as I shall now call it) of that qualification, we have got other material advantages. Consistent with the rigour of that qualification, it was impossible to try Facts done beyond the Sea; which now by an easy Fiction of placing a Plantation in an English County, may be tried in Middlesex, as well as if the Fact arose there.

It laid too a terrible restraint on Courts themselves: the Jurors being
next

next neighbours were supposed always to have evidence in their own breast ; the consequence of which, in many cases, produced this disagreeable alternative ; either that a verdict must stand, tho' contrary to the clearest evidence produced in Court ; or the Character, nay, the Liberty of the Jurors, were to be overturned, together with the Verdict, by attainting the Jury. Now the Jurors are no longer of the neighbourhood, the supposition derived from thence must fail ; if they Judge apparently wrong, that Judgment of theirs may be corrected, but it will still be by another Jury : so that the injured Party will not suffer ; nor will the former Jury suffer for their wrong Judgment, as they might sometimes have done in the days of Attaint ; nor will the Constitution suffer by dropping a Jury. Upon the whole,

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whole, I conclude, that this alteration is much for the better; that *new Trials* and *Views* are more than useful substitutes for Vicinage.

The qualification, in point of Interest, was originally but small: in 13 Ed. I. time, only 20s; in the 21 Ed. I. it arose to 40s; so it continued till Q. Eliz. with one alteration only in the interim, of inserting the qualification in the Jury process, which, I think, arose from the Stat. 35 Hen. VIII. In the 27 Eliz. it rose to 4l Freehold; in 16 and 17 Car. II. it swelled to 20l Freehold; and yet let me just observe, Juries were never so packed and practised upon in criminal cases, as during the latter end of that reign, and the beginning of the next. In 4 and 5 Will. and Mary, it came down to 10l. and has continued so ever since. Except in the case of special Juries, which,

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which, by a Statute of the late King, must have 20l.

You know Leaseholders of 50l. clear yearly value, are now qualified as Freeholders. The reason why the Law required *Freehold* Interest formerly in exclusion of *Terms*, was, because *Terms*, till within these two centuries, were very short, and of no consideration in the eye of the Law. The other being a certain provision for life, was a more sure barrier against temptation. 2. Most questions in early days, were about property of Land; and, therefore, those who had a permanent Interest in Lands, were best judges of what affected them.

I have laid before you the facts from which you will judge; but I have less scruple to tell you at once my conclusion, without a minute detail of particulars, because you are a

better judge of this subject than a Lawyer. My observation is this, that tho' the nominal qualification has varied from 20s. to 10l. in four hundred years, yet the real value is much the same, considering the different intrinsic value of money, and the different price of corn and other commodities. This it will be easy to compute from the Records of the Mint, and the printed accounts of the price of labour and provisions in those days, compared with both articles in our own. The contrast, let me observe, will be pleasant, when we consider, that the qualification for a Vote, at County Elections, is still the same as it was at first, only 40s ; it began in Hen. VI. and has continued so ever since.

§. 51. I am afraid I have but in part answered your question—you will tell

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tell me, these are only regulations of Juries, and by Law: your regret seems to flow “from a supposed diminution “ of this form of Trial; and *the effect* “ of it overturned, even where it continued.”

PHILANDER.

Indeed it did.

EUNOMUS.

By these expressions then, I conceive you mean, that in many proceedings, the Trial by Jury is dismissed; and that in many cases, the opinion of the Court has afterwards leaned against the parties who had recovered on the trial.

PHILANDER.

That is my meaning.

EUNOMUS.

By the diminution you speak of, I suppose you allude to those summary convictions, that, at first view, are levelled very strongly, indeed, against this mode of trial: where, instead of Cross Examinations of disinterested Witnesses, the Oath of an Informer joined to another Witness; or the aid of the Parties Confession, got how it can, without any Evidence but that of the Informer, concludes the Trial: and after all, *one man* is set up as a Judge of the weight of this evidence, instead of *the twelve* known to the Constitution.

PHILANDER.

You have placed it in the very light I should have done.

EUNO-

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EUNOMUS.

But, my Friend, that is not the true light. You never heard that a Justice of Peace, had a complete final Jurisdiction. He may, like the Constable in the Play, think “ he sits to “ represent the King ;” but he in that light, must remember

Regum timendorum in proprios greges,
Reges in ipsos Imperium est Jovis.

And long as this officer has been intrusted with a necessary share of Power, to lighten and diffuse the weight of Government, the Constitution has, in no instance, made him absolute in a Judicial capacity. His orders are examinable at Sessions; and from thence at Westminster-Hall. His Convictions are removable there: if Illegal, may be quashed, and himself liable to an Action; if Oppressive, in their Circumstances,

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tho'

tho' they should be Legal in Form, he may be punished by Information: in the Action and the Information, his Conduct will be reviewed by a Jury; and as they find, the Court will proceed. A Jury then, you see, is only dismissed in the first instance; never discarded. In short, I do not know any Judicial Transaction whatever, in this Kingdom, in which, in the long run, the Facts may not be brought before a Jury. In the superior Courts of Equity, Issues at Law are frequently directed to satisfy the Court, where the Depositions are not Evidence enough; if that kind of Evidence, where material, is suspected, the Witness may be indicted for Perjury in the highest Courts of Law. In the Courts of Law, where the return to their Orders are contested, the Facts returned are put in Issue. Material Affidavits,

davits, if full, but not true, are likewise indictable. And can you imagine, when in these great instances a Jury is still liable to be called upon, that a petty Constable or a Parish Officer, most ignorant of the Law, and under most temptations to abuse it, should be left a merciless Tyrant within his district? Rather do not you admire the wisdom of the Legislature, to have Justice done, when it can be without delay or expence, by these Summary Convictions: where it cannot, to reserve in the End a redress to the Party injured, a punishment to Oppressors, and a check to all in those inferior stations?

§. 52. As to the Powers which Courts have exercised after a Verdict, and very often against it, you will scarce think it a proper subject of complaint, when you have considered it ever so little.

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In Common Cafes, the effects of a trial have been defeated three ways, by proceedings after it—either upon a motion in arrest of Judgment—to fet aside the Verdict—or for a new Trial. In the first, the effect of the Trial is defeated, because there regularly ought to have been no Trial at all; or because it appears from the Record, that no Judgment can be had. Sometimes the very demand itself might have been stopped by Demurrer, without ever bringing it to a Trial; but that is where the Demand is bad on the Face of it: often this cannot be known till the proof is heard; for then it appears, tho' the Jury have found for the Plaintiff, yet that what is found is no cause of Action. In this kind of motion, I take it, the credit and capacity of the Jury is always unimpeached.

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The other two motions are levelled more directly against the Verdict itself: the first to set it aside for the Misdemeanor of the Jury, or an irregular finding: the latter for a Verdict contrary to the plain weight of Evidence, or for the misdirection of a Judge.

In both these, whatever further examination there is, must be by another Jury. In the latter, it is awarded in Terms: in the former it follows, as a consequence at the Parties option: because the Verdict being set aside, there can be no recovery or acquittal; and consequently no bar to another Action.

In all these instances then, *Philander*, your favourite Jury are still adhered to.

PHILANDER.

I was just going to interrupt you, with observing the contrary from your
own

own words. The misdirection of a Judge, that has misled one Jury, is, I agree, a proper ground for sending the matter to be examined by another: but my difficulty is about any direction of a Judge to the Jury at all: let him, if you will, recapitulate the Facts, but not observe upon them. I have sometimes heard, this Province of the Judge has made a cypher of the Jury; nay, has even made them find contrary to their own meaning.

EUNOMUS.

I am glad to find you do not vent this notion as your own: it is what I have heard too; but have as often observed, that it proceeded more from private interest or party zeal, than principles of Law. I know too, that directions have, in some Cases, been carried much too far. Nobody can
read

read the State Trials without owning it. But a particular Case, where the law is forgot, is no argument against the general policy of Law itself. I will therefore, with great diffidence, lay before you, what seems to me the policy of the Law, in this respect; what directions, in general, a Judge may or ought to give to a Jury.

§. 53. All that I have said or have to say upon the subject of Juries, is agreeable to this established maxim: "that Juries must answer to questions of Fact, and Judges to questions of Law." This is the fundamental maxim acknowledged by the Constitution. And yet this is the maxim, which those who have advanced Doctrines against the Constitution, have ever in their mouths.

Funda-

Fundamental maxims of Law or Government, are so plain and intuitive, that every body understands them : the lowest capacity makes them their standard in their own breasts, to judge by. And, therefore, those who would lead a party in a wrong cause with success, must do it, not by disputing fundamentals ; but by avowing, and afterwards perverting them. This seems to be the case at present.

It is undoubtedly true, that the *Jury* are Judges, the only Judges of the *Fact* : is it not equally within the spirit of the maxim, that *Judges only* have the competent cognisance of the *Law* ? Can it be contended that the Jury have, in reality, an adequate knowledge of Law ? Or that the Constitution ever designed they should ? I will only remind you, that every country Village has its Jurors ; whom nobody

body will suppose to be Lawyers. And it is from the generality, that we are to form our notions of the nature of a Jury, as the Law has prescribed it; not from the abilities of any particular man, or any particular Jury. Well—
 “but the Law and the Fact are often
 “complicated?” Then it is the province of the Judge to distinguish them: to tell the Jury, that supposing such and such Facts were done, what the Law is in such circumstances. This is an unbiaſſed direction; this keeps the Province of Judge and Jury diſtinct; the Facts are left altogether to the Jury, and the Law does not controul the Fact, but ariſes from it. If the Law is thought to be miſtaken, the direction of the Judge that gave it, will be conſidered (as I have ſaid) in another Court; and if it is miſtaken, the Verdict, in conformity to it, will be of
 no

no effect. But I never yet knew a Verdict complained of, as contrary to the direction of Law given: it can never be concluded it is. And the reason is, because the Law arises only from the Fact; and the Jury previously find the Fact in their own mind, before they couple it with the Law pronounced from the Bench, to make up their Verdict. Every Verdict is compounded of Law and Fact; but the Law and the Fact are always distinct in their nature.

But *Littleton*, and his great *Commentator*, have been made advocates on this occasion. They have been thought to say, tho' at the peril of contradicting themselves an hundred times, that Jurors are Judges of the Law as well as the Fact.—“ If they
 “ will take upon them the knowledge
 “ of the Law upon the matter, they
 may

“ may give their verdict generally, as
 “ is put in their charge.” But does
 not the Judge betray his trust, in not
 telling them how the Law is? If he
 does not tell them, it is true, they
 may suppose it to be so, and find ac-
 cordingly: if he does tell them how
 the Law is, they are to compare the
 Fact with the Law; but can never
 say what the Law is. The Law is
 never submitted to them as part of
 their inquiry. No finding, as I have
 said, can in general be complained of,
 as against a Judge’s direction, but as
 against the weight of Evidence: and
 in that case the remedy is well known.
 The warrant of Commitment, as stated
 in the return in *Bushe’s Case*, it is
 true, was expressly granted against the
 Jury, *for finding contrary to the di-
 rection of the Judge in a matter of
 Law.* Which part of the Return,

Ch. J. Vaughan said, literally taken, was " insignificant and not intelligible ;" and if it had any meaning, stripped of the veil, and colour of words, was a direct argument for the abolition of the Form of Trial by Jury : because the Judge in such case, must resolve both the Law and the Fact. True it is, the Ch. Justice does there put a particular Case of a Jury finding against a Judge's direction, which, in general, for the reason I have mentioned, is impossible. And that case is, where a Judge asks the Jury, previous to the Verdict, how they find such a particular thing propounded to them ? If, on their giving an answer, the Judge adds, Then on your finding the Fact so, the Law is for the Plaintiff or Defendant : and if the finding is afterwards contrary to what he declares ; they do, in that case, find contrary to the Judge's direction in
matter

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matter of Law. But then you see in that case, the regular order of proceeding is inverted; the Judge makes them find a particular Fact, previous to his declaration of the Law. Whereas, what Lord Vaughan calls the *discreet* and *lawful assistance* of a Judge to a Jury, is always to give an hypothetical direction to the Jury: not by previously having their answer to the Fact, and by thereupon declaring the Law, to controul their Verdict; but to leave their Verdict free, by saying, *if you find the Facts so and so*, then the Law is for the Plaintiff, or you are to find for the Plaintiff, or vice versa.

All this reasoning shews, that the province of Judge and Jury, as to Law and Fact, are separate and exclusive: that in the general and regular form of proceeding, it is impossible for a Verdict to be said to be against

a direction in Law; but if the Case should happen, the Verdict must be rectified, for this plain reason, that it appears, in such a Case, the Jury have taken upon them the Determination of the Law, which is entirely out of their Jurisdiction. These observations seem to be a full answer to the contrary doctrine in Sir John Hawle's Book; and other scattered occasional publications.

But *Philander* will excuse me, if I address myself for a few moments to you, *Policrites*, in vindication of a point of so much importance; and which, whenever it has been the public topic, has unfortunately been strangely mistaken, if not wilfully misrepresented.

Besides what I have already said, I think it will undeniably appear, that Juries are designed, by the Constitution,

tion, to be Judges of the Fact only, and not of the Law, for these reasons :

First, Because the contrary supposition is against the plain tenor and import of their *Oath*. The Form of every Oath administered in a Court of Justice, is either according to Common Law ; or as required by some Act of Parliament. An Oath of Office contains a summary description of Duty ; and the Terms of this Oath are so strictly applicable to Fact only, that they do by the strongest implication, exclude any cognisance of Law.

Every Juror in a Cause is enjoined by his Oath “ well and truly to try the “ Issue joined between the Parties, and “ a true Verdict to give according to the “ Evidence.”—Now to consider this by parts, 1. He is *well and truly to try* : how can any one well and truly try any point, but according to his

knowledge? Either according to his own previous knowledge; or according to the Information he meets with at the time of the Examination? A Juror may have knowledge of both kinds as to the Fact; but can have of neither as to the Law. I have already intimated, the generality of Jurors are not Lawyers; they, in general, therefore, can have no previous knowledge of the Law that may arise in the matter before them. They are, for the same reason, as incapable of making any adequate decision of the Law they shall hear during the Trial. The Council on each side, may insist the Law is on his side; the Jury must be incompetent Judges of which are in the Right, for want of being previously acquainted with the Subject. As some opinion then, in such cases, must be formed; they must acquiesce in the direction

direction from the Bench. That direction, I have observed, is not conclusive on the Parties: but may be reviewed by the Court where the Record came from; and afterwards in another Court upon Appeal.

2. The Oath directs the Jury to try *the Issue joined*: this Issue is always a Fact denied on one side, and affirmed on the other. Where the Law is directly in dispute, the Issue goes before the Court, and not at all before a Jury. And tho' during the Trial of an Issue of Fact, points of Law do very often incidentally arise, it does not follow from thence that they are under the cognisance of the Jury, any more than disputes about Practice, the competence of Witnesses, or whether such and such Evidence is admissible, which do as often arise in the course of a Trial; and were never

contended to belong to the Jury. The Law, therefore, because it arises out of the Fact, and because in the end it is to govern it, does not, on that account, appertain to the Jury; if from other considerations it appears to be improper.

3. What can be meant by a "*true Verdict*?" Truth, I believe, both Philosophers and Lawyers will refer to Fact, rather than opinion, about Law: when it is referred to opinion, we mean the agreement of a Proposition with our own ideas, or the ideas of others. But how those who have (as I mentioned) such faint and imperfect ideas as Jurors have of Law, can discern this agreement, or judge of the Truth in such a Case, I am at a loss to conceive.

4. But to exclude the possibility of a doubt in this question, their Oath
does

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does not barely direct them to find the Truth, but tells them what rule or measure they are to go by in their enquiry : they are to find “ *a true Verdict according to Evidence :*” this branch of the Oath, which governs the whole, can be applied only to the Fact : the Fact only is in Evidence ; and consequently the Law not being in Evidence, is not before them. If the Law was to have been included in their enquiry, the Oath should have run, “ to find a Verdict according to Right “ or according to Justice ;” and not barely according to Evidence. Thus in the clearest Terms, does the Oath limit and define their duty.

But, secondly, in the course and management of a Trial, other persons are, likewise, under an Oath, and have duties incumbent on them also.

Now

Now without looking into the Oath of a Judge, it will be easily understood to be inconsistent with his duty and his Oath, to be a mere cypher on the Bench. A Judge, however, will be little more than a cypher, either if he sits and says nothing; or if what he does say, is to go for nothing. I have already insisted, the Jury's unacquaintance with Law, makes it necessary for the Judge to tell them what the Law is in the Case before them. He tells it them surely to very little purpose, if they think themselves afterwards at liberty to determine otherwise.

3. But besides this view of the question, arising directly from the nature of the Oaths and Offices of the Judge and the Jury, there are other collateral arguments, which deserve to have some weight on this occasion, because they seem to flow as necessary
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consequences of the fundamental maxim I sat out with; they are an explanation of every day's practise; and the reason on which that is founded, incontestably establishes the distinction of the maxim itself.

But because it is extremely difficult to be understood on topics, so strictly technical, by any body but Lawyers; I shall be very concise on this head.

The arguments I allude to, arise from the Forms of Pleading, and the general Frame of Records. There are none, perhaps, more justly to be relied on, than what arise from an uniform unvaried manner of Pleading.

1. It is well known, in constant Experience, that by the mode of drawing a *Demurrer*, the matter in debate is referred altogether to the Decision of the Court, and in reality never does go before a Jury. By a Demurrer, the
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bare Law is in question; the Fact being constantly admitted, if clearly expressed. The reason of admitting the Fact in that case (I take to be) that without such confession of the Fact, the Court have no ground to go upon: For the Law, in every case, arises from the Fact. Even in speculation the very supposition of a thing being done, is antecedent to the Enquiries concerning the Legality of doing it. And, to use Lord Holt's expression, a Court will not set to determine Coffee-House Wagers: or as Lord Bacon emphatically says, "nil habeat forum ex scena." The Case then must really exist, before the Legality of it, as to circumstances, will be determined. But if a matter, where the Law only is in question, is never sent at all to a Jury; it proves, almost

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to Demonstration, that the Jury have nothing to do with bare Law.

2. Nor is the argument to be drawn from the nature of a *special Verdict* of less force on this occasion. The ignorance of the Jury as to the Law in the Case, and their reference to the Court, is the constant Language of a special Verdict. Not that the Jury can be supposed more ignorant of the Law arising in such a Case, than they are in a thousand others, where all is concluded under a general verdict: indeed, in that light, at this time of day, the Common Juries are amazingly improved in their knowledge of the Law; there being very few instances of their expressing their doubts in special Verdicts at this day. The reason of having special Verdicts at all times, was in order to have the point of Law solemnly determined, and remain on Record;

cord ; without which, in many Cases, no Writ of Error could have been brought in former times, nor the point reserved for the consideration of the Court. The usage of *stating a Case*, and having a general Verdict subject to the opinion of the Court afterwards, on the circumstances of the Case, is an invention of late times ; and is found, in Practice, to be less expensive, and answer to the Parties as well as a special Verdict. And, indeed, from this mode of proceeding, the Court have the same satisfaction, tho', by the Record not being particular, Posterity have not. But both the Case stated, and a special Verdict, are, as far as they go, proofs of what I am contending, by expressly leaving the Law to the Court : and yet are not exceptions to all other Cases (as some have insinuated) in this respect, be-

cause every body must allow, the Jury, in reality, are at least as ignorant of Law, in other cases, as in that of special Verdicts, where alone they confess their ignorance.

I shall only add to this prolix refutation of the notion I have opposed; that it has been made use of chiefly in the Case of Libels, and, perhaps, would never have been contended for as a general doctrine, if it was not to serve particular purposes. Most writers, it is true, have cautiously disclaimed being advocates for a Party; tho' the very date of their Observations, and manner of concluding them, have too often discredited their assertion. Indeed, without the imputation of designed partiality, the best men are too apt to be warmed with recent events. The only time for a calm dispassionate inquiry in such points, is when the
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event is at a distance, and the voice of Faction is silent.

The professed Patrons of the notion I have argued against, have (I say) principally applied their doctrine to the Case of Libels : but were aware, that the conclusion would be general, tho' the Case was particular ; because the Right of Juries to determine the Law in the Case of Libels, could only be a consequence of their right to find the Law in other Cases. There seems to be this fatality, that has, in Practice, attended the Case of Libels, that the Law and the Fact do not seem to have been always accurately distinguished : and, perhaps, in feverish times, some particulars have been contended for as implications of Law, which ought rather to have been considered as Facts.

But the least reflection is sufficient to shew, that the power and province
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of Juries is the same in Case of Libels, as in every other Case. And that in no Case whatever, a Jury has, in its nature, a cognisance of Law, tho' by accident the Law may have been sometimes left to them.

Much, I fear, has your attention been abused in my attempts to settle a point that has, at times, laboured under the most flagrant perversion, heightened by all the fallacy and false colouring that Faction is too apt to bestow on favourite objects of speculation. It only remains, to take up the conclusion, which I hope you have long before formed, that the Trial by Jury is as much respected as it used to be, and much more improved.

And, however a Jury is seemingly dismissed, by Act of Parliament, as to some Misdemeanors, I know no Case, "Concerning Life or Limb," which

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is not subject to the Examination of a Jury, and oftener, before the Trial is compleated, to two Juries than one.

§. 54. Indeed, the *Criminal Law* of this Country, is one of those points of eminence in the Constitution, that taking your view from hence, you may command the most extensive prospect of Liberty, and look down (as I may say) on all other Governments far below it. I think this will be evident, if I remind you ever so little of the nature of Crimes and their Punishments; of the manner of charging and convicting Criminals.

The Laws of England, in relation to *Crimes*, differ very much from those of other States; and are excellently fitted to the convenience of the English Government. I do not suppose any Country has such fixed and precise ideas of Crimes. Of which the various

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rious and well defined shades of Guilt in Treason, Homicide and Thefts are very remarkable instances. This precision is the more necessary, because the Punishment is, (as hinted) in all cases of Crimes, as fixed as the Crimes themselves.

The complexion of our Penal Laws is no more Severe than it is Arbitrary. All *Torture* is disclaimed even as a Punishment, much less used as the means of Conviction, as it was by the Roman Law, and still is in many other Countries.

PHILANDER.

§. 55. Our own, indeed, in this respect, has greatly the advantage over most other Countries ; but, I cannot help thinking, in one respect, other Countries hold out an example worthy to be followed even by us. As on

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the one side, the Law of England disclaims the use of *Torture*; on the other hand, I think, it makes too free with *Death*. Several States in Europe, (as Sweden, for instance) apply hard Labour instead of Death, as a Punishment for all kinds of Theft; many of which, in England, are punished with the loss of Life. The late Empress of Russia, perhaps by an excessive strain of humanity, abolished capital Punishments in all Cases whatever. The natives of America, on the other hand, we are told, punish every thing with Death. We go too far; and (tho' want of Compassion is a Character our Enemies would hardly fix upon us) are guilty of a kind of stoical absurdity, in making Crimes of the most different malignity, equal, by inflicting the same Punishment. With us, Murder and Theft are punished in the same

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same manner. With us, if a man takes three halfpence from the person of another on the Highway, the Law says, he shall be hanged : if he takes a thousand pounds in the same circumstances ; what does the Law say more ? I am not urging, that the Law in any Case ought to go further, by accompanying Death with Torture : but that it ought in many Cases to stop short ; and to make Death more terrible when it comes, let it seldomer be seen.

EUNOMUS.

Death, you will allow, must here, as in all Governments, be admitted in the last resort, in many Cases. And those, who wish to reduce the number of these Cases, and, in some of them, to exchange Death for Slavery, have, I fear, been misled by a compassion,

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founded, in some measure, on the ignorance of their own Constitution; and a bad imitation of other Governments. They undoubtedly forget that amiable Power of the Crown, whereby *Mercy seasons Justice*^a, a Power that *can* at any time, and so often *does* arrest the arm of Death; tho' the Law has raised it ready to give the stroke.

PHILANDER.

You mistake me, *Eunomus*, if you think I urge an exchange of Death for Labour, on the mere principle of compassion to the Individual: I do it in a much more extended view; as a point of the utmost concern to the Community. It is in this light, I remember, several of our greatest Politicians have considered it. In saying which, I would be understood more

^a Shakespear's Merch. of Ven.

particularly

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particularly to allude, not so much to the fanciful accounts of *Utopia*, as to what has been more professedly and seriously advanced by *Sir Will. Temple*, and the celebrated *Bishop of Cloyne*. In the beginning of our conversation, we allowed them both an authority as Travellers; and tho' they may have borrowed this hint from other Governments, I am sure they are writers of that literary and political rank, that you will not impute any thing they may happen to apply from other Constitutions, to an ignorance of their own. In the shortest view of the question, what can sound Policy, as well as Humanity, say in the present case, contrary to what *Horace*^a has said on an occasion nearly similar?

Vendere cum possis captivum, occidere noli :
Serviet utiliter. Sine pascat durus, aretque,
Naviget, ac mediis hyemet mercator in undis.

^a Lib. 1. ep. 16.

You will tell me, perhaps, that *our State* has neither the Mines of Sweden, nor the Gallies of France, for the employment of their Criminals. But it has employments that will answer the same purpose to the Criminal, and a better to the Public: where they may be more useful in their work, and more seen while at it. The writers I mentioned, will remind you of *Repairing Roads, making Rivers navigable, draining Bogs, working in Docks, and in Fortifications.* And, in my opinion, a *Querist* condescends to doubt whether the Sun shines at noon, when he asks, “*whether we might not as well make a Criminal useful in public Works here, as send him either to America or the other World.*” The many Cases under our present System, in which hard Labour is the express Punishment for a limited

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time, are sufficient to recommend an extension of it for Life, as a Punishment for greater Crimes; with this only difference, that the World should be the scene of vindictive Justice in the latter Case, not a private house of Correction as in the former. Upon the whole, I conclude, a regulation of this kind, well considered, will make every end of Punishment meet, which it is impossible to do by any other: it is more likely to *reform* the Criminal himself; to *make Satisfaction* to the State, or the Party injured; and to be *an Example* of Terror and Consequence to the Public.

EUNOMUS.

I am not apprehensive of giving your argument more weight than I could wish it, when I observe to you, that others who have been for moderating capital

capital Punishment, have found out other applications of a Criminal for the Public service, than that of Labour. A celebrated French Philosopher, was of opinion, that Criminals who, according to the present prevailing notions, have forfeited their lives to the Community, might be made use of for new experiments to promote natural knowledge : so that they might, with a chance of life, be made the Instruments of Science, instead of the Victims of the Law, by a certain and infamous Death on a public Scaffold. Something of the kind has been practised in England. The first trial of Inoculation for the Small-Pox, was made on a capital Convict, at the request of some eminent Physicians at that time. Any thing of this kind in England must, as the Law now stands, be done by the King's Prerogative ;

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gative; by the remission in a particular case of a Sentence, which the Law passes in all Cases of the like nature. But the question now is, whether this Sentence of the Law is in itself severe; or if it was more favourable to the Criminal, whether it would be more useful to the Public?

Had your argument been built merely on Compassion, it would have wanted no apology; for if Compassion, in a large view, is a weakness, it is such an one, however, as nobody need be ashamed of: it is the frailty of a man pleading for human Nature. Lord *Coke* himself closes his history of Crimes and their Punishments, with very tenderly lamenting, that so many suffer capitally every year. But there is not a single insinuation throughout his book, that the Law is at all too severe; or makes more Cases capital than
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should be so. Two reasons strike me, why the Law, in the Cases you alluded to, should stand as it is.

1. Because the Law, as it stands, does, in my opinion, best answer the noblest purpose of Criminal Law, that of *preventing* a Crime, rather than *punishing* the person who commits it. In maintaining this assertion, I consider the power of *punishing*, and the power of *pardoning* taken together, as parts of the same System. The Law is fixed as to the Punishment of the Crime : but a discretion is left in the King, as the executive power to moderate the Punishment according to the circumstances of its commission. Its being fixed, best answers the freedom of the Government ; and its being capital, best answers the purpose of Terror, by example to others, when it is necessary to inflict it. And yet
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the power of moderating by occasionally relaxing the severity of a capital Punishment, does, in point of Fact, take off your imputation of a stoical absurdity in making Crimes of a different malignity equal, by inflicting Death alike for all. But here, my friend, you have unawares dealt in *Utopia* goods, which before, in point of serious argument, you had allowed to be contraband. *Sir Tho. More*, it must be owned, has indulged many a conceit in his Book, which he would never have uttered from the Bench. And tho' he has said much on the severity of this Punishment, I think all that he has said is answered by this power of the Prerogative, in checking that of the Criminal Law; and that the Law, therefore, does not deserve to be arraigned for its rigour, because it may at any time be mitigated by the
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power of Pardoning, that is so valuable a part of it.

2. But even independent of this consideration, I think the Law is much better as it stands, than to have it altered on the grounds that have been proposed. Because the Law cannot well be altered on those Terms but against the direct spirit of the Constitution. I would not have *Slavery* introduced into this Country even as a Punishment. If Labour is only another word for Slavery, I see little difference, in point of mitigation, between Labour and Death: they may well be placed together, as they are by *Virgil* in his description of the Infernal Regions: they are both *alike dreadful* in their mien, *alike distant* from *Elysium*:

Terribiles visu Formæ! Lethumque Laborque.

That the hard *Labour* your Politicians
recom-

recommend, must be *Slavery* here, and that it is so wherever it is used, I need take no great pains to prove. The quotation from *Horace*, is not so much on your side, when you reflect a Criminal must be treated differently from a Captive. And not one of the writers mentioned, affect even to disguise the term of Slave. *Sir Tho. More*, to give the example of antient Rome the greater weight on this occasion, calls it, the Mistress of Political wisdom, and then tells you the Criminals there, were condemned ad metalla, "*perpetuis adservandos vinculis.*" But even in our own times it has been asked, by your favourite *Querist*, whether "*the view of Criminals chained in pairs, would not be very edifying to the multitude?*" What? to see several hundred people in England, working on the Roads or in the Fields,

or employed about public Buildings, *chained*, and obliged to submit to the wanton severity of their masters; to make the whole Country, which ought to be as free as the air that surrounds it, as it were one universal Gaol or Dungeon; and to have no other voice in our Streets than that of oppression and misery: the very supposition is shocking! And without pursuing remote consequences, if this punishment operated by way of example to the Public, it must operate from a principle of *Fear*, not from motives of *Terror* arising from the severity of the Punishment, but of an abject Fear, that is in its own nature the very reverse of that principle on which this Constitution is founded: and which, I doubt not, would in the end go a great way to destroy it. Not to mention, after so weighty a consideration,
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that this expedient would be as unnecessary for the public, as it would be dangerous and impolitic. There will be always hands enough to work on proper encouragement: and freedom and industry surely have more music to an English ear, than hard labour and chains. This way of thinking satisfies me: and I am happy in observing, that after all that has been said in print to promote this scheme, it has been offered to the Legislature, and nobly rejected.

Our debate has, as usual, carried us out of the direct road: before this point was started, I was going to remark, that in early ages our Ancestors, like most other nations, in a rude state of policy, fell into the two modes of *Punishment*, that Barbarism alone could invent or adopt. The first, that of punishing the *peccant Member*, as

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it was called. In Slander and Perjury, the tongue was cut out. A Cut-Purse lost his right thumb : and this, I take it, first introduced burning the hand (rather than any other part) in the case of Clergiable offences. So in House-Burning, the Felon was burnt : and for striking in Westminster-Hall, sitting the Courts, the right hand was cut off.

They likewise fell into the other mode, of accepting a *Fine* in lieu of exacting corporal Punishment on the Offender. This notion was dictated, not so much from an undue sense of the malignity of Crimes, as partly from religious scruples ; our Saxon Ancestors thinking that, under the Christian Institution, no person ought to die for any Offence. But it might be partly also dictated by the necessity of the times, which, in the infancy
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of Society, made them value life too much to shed the blood of any man, even in satisfaction for that of another he had killed. But the first dawn of political reason, disperses these clouds, that can obscure only the most dark uncivilized ages. And tho' our Ancestors soon came to put a different estimate upon the life of a Man and that of an Ox; yet in no time can the Laws be accused of Cruelty; or be said, as Draco's were, "*to have been wrote in blood.*"

§. 57. If this is the case in settling the Punishment of Crimes; how much more engaging is the humanity and tenderness of the Law in its manner of Charging and Convicting a Criminal.

The *Charge* may be said to commence with the warrant of Commitment. The word itself is the

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common, tho' not the necessary language of the Warrant, any more than the information upon Oath, on which it is granted. The Magistrate is not obliged to express either in his Warrant; but if under colour of this omission, he acts without them, he will himself be liable to answer in a criminal way, if the party is afterwards acquitted. I shall be well understood by *Policrites*, when I add, that one of our Crown writers, *Hawkins*, says, (and a very great living authority has confirmed him in saying) it is safer to insert " the information " on Oath in the Warrant, tho' it is " not absolutely necessary."

The *Commitment* itself is a necessary indispensable step in few Cases only. And the Habeas Corpus Act, in that respect recognising and strengthening the Common Law; makes it necessary

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cessary to justify the Detainer, that the Treason or Felony should be plainly and specially expressed in the Warrant. Every other Case (not excepted by express provision of Law) is bailable; and if the Magistrate refuses Bail, or exacts illegal Bail, he is punishable for his Oppression; and the Prisoner, upon giving reasonable security, will be discharged out of Custody. The reason why the Law refuses Bail in certain cases, seems to be, that these being capital cases, no Property, which is the utmost the Bail can forfeit, shall be deemed an equivalent to the State for the life of man, which the Law has fixed as the Punishment for these offences. It was for the same reason, in our ancient Law, that when a Criminal fled from Justice, his Outlawry amounting to an Attainder, he was considered as dead, and any one

might really kill him. At this day, that rigour is abolished; and upon appearance, the Out-lawry itself, tho' it still is an Attainder, is very easily reversed in preference to a fair and candid Trial of the Fact.

And I am sure you will think it a very fair *Trial*, when I proceed to inform you, with what caution the accusation itself is made; and with what exactness, it is afterwards proved.

§. 58. Every criminal Case is, in the end, subjected to the Examination of two Juries, except that of a Parliamentary Impeachment; and, in some cases, to three Juries: and this only to the completion of a single Trial. An *Impeachment*, which in name only is not a Trial by Jury, is, in reality, that, and a great deal more: for the Accusation is made in so many distinct articles by the *House of Commons*, the

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grand Inquest of the Nation; and that Accufation is heard in the moft unexceptionable manner by the *whole body of Peers*. The Majority of whom muft find the Prifoner guilty, and will, in moft cafes, exceed ten times the number of a common Jury.

The fingle Crime “ of the Death “ of Man,” is fubjected to three, I may fay, four Juries: that of the Coroner, the Grand Jury, and the Petit Jury on the Trial; to which, in very particular circumftances, may be added the Trial on “ an Appeal.” The Crime itfelf will well juftify this extraordinary caution; the lofs of a fubject to the King on one hand, and the feverity of the Law to the Criminal on the other: for this is the only Crime which muft be pardoned by exprefs name; and which has very

rarely met with the mercy of the Crown.

The *Accusation*, in most Criminal Cases, is by the *Grand Jury*, consisting of at least twelve persons of rank and property, in the County where the Fact arose : and it is made upon substantial presumptive Evidence. You know very well, that Accusation found by them and drawn into Form, is called an *Indictment*. The Etymology of the Term, very well expresses the precision of its Form. It must describe the nature of the Crime itself, and the circumstances of its Commission, by the Person accused, with that certainty, that if the Facts as laid in it, are proved, and apply to the Crime rightly alledged, it must be a " demonstration," that the person accused is Guilty.

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The manner of *proving it*, I am next to consider. And it is in a few words by living Witnesses, examined in open Court; and the weight of their Evidence is left to the Judgment of twelve men.

The Law of England, in this respect, differs from all Countries in the world; it desires *no Confession* from the Accused; and nothing but the force of conscience can oblige him to it. For the Law takes the proof upon itself, desiring only of the Prisoner, that he would say whether *he is or is not guilty*.

In Criminal cases (Treason excepted) the Law allows no Council to the Prisoner; except only in points of Law. This denial of the Law has been censured in the first case; and others, who seem to pay them no compliment, have blamed the admission
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on the other. If I could but understand the objection, I should not despair of answering it. Whether our Law in the denial of Council copied in part the Civil Law, where it likewise obtained, is not easy to say. It is much easier to vindicate it in our own, than in the Civil Law Form of Trial. Our Law supposed the proof would be so plain when left to the Jury, and that the Judge, before it reached them, would so attend to the Examination, as to be, in some measure, (as the books call him) *Council* for the Prisoner. But every body knows, usage has long abated this rigour, if it is any.

As to those who take up the other objection, and are against any Council at all in Criminal matters; who, because Council on one side appear in support of the Prosecution, and on the
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the other in support of the Criminal; and because the same Council might before hand, as applied to, have been indifferently on either side, do therefore represent him as indifferent in himself, to guilt or innocence; and ready to turn one into the other, as he is employed: this humourous and candid way of thinking, though it is not uncommon, is seemingly not quite so just.

A Council in any case whatever, never defends the Crime itself; it is his business only to see the person accused is not wrongfully convicted; and in that respect, he can only do what the Party himself, if he was able, and master of himself in such circumstances, might do; manage his own Evidence, and watch that produced against him. And tho' in all, but the cases mentioned, the Law
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allows Council ; yet in no case, Civil or Criminal, does it compel him to have any

In Criminal cases, the Law does not restrain the proof to one Witness ; but the Evidence of one Witness, unaccompanied with circumstances, or the Prisoner's free, unbiaſſed Confession, must be very unexceptionable, to have much weight with a Jury.

§. 59. This Form of Trial, by Jury, valuable in Cases of Property, is peculiarly so in Cases of Life and Liberty. It is founded, in general, on *Parity* of circumstances and condition. As if those in the same condition of Fortune were most conversant of each others affairs, and most likely to do each other Justice. Thus the temporal Lords, who are all Peers among themselves, with respect to their Parliamentary capacity, tho' different in dignity, are to sit in Judgment on a Lord indicted
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or impeached. Thus, in ancient times, a Knight was to be tried by Knights; for tho' a Knight was only a Commoner, yet as he had a stated Property to qualify his Dignity, it was looked upon as more agreeable to the principles of the Constitution, to have his Triers of the same Property: his distinction came in with the Feudal Policy, and as that wore off, was abolished. Commoners, for the same reason, are the proper Juries for Commoners. It was partly from this principle of Parity, that *Party-juries* were introduced; which obtain in the Trial of a Foreigner, in a Jure Patronatus, and by a Stat. of Hen. VI. in a prosecution for embezzling Records.

It is by naming what is of the very essence of this Form of Trial, that the Form itself is mentioned in one of the noblest clauses in Magna Charta. And

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I cannot help expressing my surprize at Lord *Coke's* Comment on that clause. The Statute says, no Free-Man shall be tried in a Civil or Criminal case, *nisi per legale Judicium parium suorum, vel per legem terræ.* Lord *Coke* begins by reckoning up the “ branches of “ Law that, he says, spring out of “ this root;” and adds, dryly, “ that “ no man shall be condemned at the “ King’s suit, but by Judgment of his “ Peers, that is, his equals, or according to the Law of the Land.” But when he comes to a particular comment, on the words—*parium suorum*—he runs away with the sound of the word, and speaks only of the *Trial of a Peer*, in the most confined sense of the word: which, tho’ it is now used merely in speaking of the Nobility, was not known in that sense, till ages after the Statute. It could not be the sense
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of the Statute ; because *every Freeman* is there spoken of, as to be tried by his *Peers*. And surely the idea of English Freedom, was not so very confined, even long before that Statute ; much less so, at the time of passing that Statute. I take it to be extremely clear to mean the same thing, as the Statute of Treasons has expressed in other words, *gens de leur condition*.

To finish this short sketch of our Criminal Law ; when a Prisoner, upon clear Evidence, is convicted of the Crime, of which he was accused, his *Trial* is closed by the settled *Judgment* of the Law. But if, after all, there are any circumstances in his Case that speak for Mercy, the Judge before whom he was tried, may respite his Execution, in order that the King may *pardon* him.

§. 60. I am afraid, in endeavouring to satisfy you on this topic, I have borrowed some of the time, that I must employ in others. I am next, in order, to answer your other questions, *as to the clashing of seemingly opposite Jurisdictions*; and the best way, I conceive, to treat clearly and at the same time concisely, on so intricate a subject, as that of different and seemingly interfering Jurisdictions, will be to premise a few plain positions, to which all that I shall say may be reduced. And they are these three: 1. That as every legal right has a remedy to be met with in some Court or other; so there is, in every case, one Court better calculated to give a remedy than any other. 2. That no person can sue in two different Courts for the same specific remedy. 3. That where different Courts have concurrent Jurisdiction,

jurisdiction on the same transaction; it is with a very different view, and for different purposes. 1. If the Jurisdiction is *simultaneous*, the end of the Proceedings is different. 2. If the Jurisdiction of different Courts on the same transaction is *successive* (as on Error or Appeal) the Proceedings in the higher Court are, in their nature, a Superseedeas to those in the lower.

1. In support of the first position, I shall shew you, that of the four great Courts, each has something particular, tho' not altogether exclusive in its Jurisdiction.

Borough Courts, Ecclesiastical Courts, and others of confined or local Jurisdiction, either with respect to the person or the object, shew that there must be a certain coincidence of qualities in the suitor, and the nature of the suit, to give any Jurisdiction at

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all: and, therefore, these are easily reconciled to the position laid down; being, in most cases, not merely the best, but the only mode of obtaining relief in particular cases. Therefore, I will not detain you at present with these, but apply what I have to say to the Courts of general Jurisdiction, I mean the *four great Courts at Westminster*.

We are to look for the Commencement of these Courts at the dissolution of the *Aula Regis*; for that Court, like Nebuchadnezzar's image, the origin of the four empires, was crumbled, at length, into the several Courts of Chancery, King's Bench, Common Pleas, and Exchequer.

Their Creation was probably not coæval; tho', as their respective dates can be discovered by no Evidence of Law or History, it is not allowed in

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the eye of the Law to say, which of them is the most antient. Nor, indeed, are any probable arguments, on this point, to be drawn from collateral matters.

Each of these Courts, at first, had probably distinct and exclusive Jurisdiction. It is unreasonable to suppose that four Courts, at all near each other, as to the time of their origin, should have any similarity in their original plan of Jurisdiction. Nay, their present strength itself is attended with some circumstances that point out their original weakness; I mean those *fictitious suggestions* that colour over their process.

The Court of *King's Bench*, the sovereign Court of original Jurisdiction in criminal cases, seems to have been at first intended to have cognisance only in Pleas of the Crown; except-

ing those cases, where the officers of the Court were privileged by reason of their attendance, to sue or be sued there in pleas of trespass or debt. Or where persons were already under the custody of that Court; and were to be charged with another suit.

From hence arises the Fiction, that (in order to warrant the Proceeding of this Court in Civil Suits) supposes every really unprivileged person, which at this day is almost every Suitor, to be already in the Custody of the Marshal of this Court; and he is declared against accordingly.

The Court of *Exchequer* was at first only a Court of Revenue; and no person was either to sue or be sued there, unless he claimed debts under the King, or was debtor to him. Ch. Justice *Treby*, in a very solemn argument, not a century ago, observed,

“ It

“ It was for the sake of the Revenue,
 “ that the Court of the Exchequer
 “ had any thing else to do.” In Ed. III.
 time, a Writ of Nisi-prius was allowed
 to be granted before the Chief Baron
 of the Court, *if* (as the Statute says) *he*
was a man of the Law, which shews
 he was not so of course. And tho’,
 as a Court of Equity, it has long been
 open to all Suitors, it still nominally
 preserves the features of its original
 Institution; by representing its Suitors
 as Farmers of the King; and suggest-
 ing that the detention of the thing in
 demand, “ makes them less able” to
 satisfy the King’s debts.

The *Common Pleas*, which, from
 its being fixed in one place, from its
 Practisers being persons of great expe-
 rience, and called by the King’s Writs,
 was early at least, if not originally, de-
 signed to have the general cognizance

of Civil Injuries, or Suits between man and man; and tho' a communication of Civil Jurisdiction has been formed with other Courts, it has gained nothing to balance its loss. It is still the only Court for real actions; but real actions are seldom brought. It still, as it began, is confined to Civil, without the least participation of Criminal Jurisdiction; except what every Court must have in the power of vindicating itself from any contempt of Suitors, or of correcting the misdemeanors of its own officers.

The Court of *Chancery*, considered as a Court of Law, was to hold Pleas only where the King was properly a party, or where the Plea touched the Office of Chancery. But its sovereign Jurisdiction is as a Court of Equity. Its being no Court of Record, its binding the Person only, and not the Land,
by

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by its Decrees; its practice of transmitting Records to be tried in Courts of Law; are all so many symptoms of its former original imbecility.

The term *Chancery*, is not peculiar to this Court; it is applied, at this day, to other Jurisdictions. Thus an Appeal is said, in many Cases, to lay before the King in Chancery; not in the Court of Chancery, or a Court of Equity, but before delegates commissioned by the King, and appointed under the Great Seal for that particular purpose. Nor is the term *Chancery* confined to this Kingdom any more than one Court in it. Every Kingdom in Europe hath its *Chancellor*: and tho' the Etymology of the Term is not agreed, yet the nature of the office is, in part, the same in all. It is commonly applied to the first officer of Law and State, and seems to take

its name from a power vested peculiarly in him, delegated by the Crown, of "Rescinding" particular Acts.

And thus the Term *Chancery*, tho' in a large sense very different from what we mean by it applied to one Court, yet, even in the largest sense, denotes the original Jurisdiction of the Court of Chancery, as a Court of Equity; viz. "the power of moderating the Summum Jus."

For (tho' I beg to be understood, as speaking on this subject, too great for any private person, with the utmost diffidence) the progress of Equitable Jurisdiction seems to have been in this manner. It appears, at least as far back as King *Edgar*, that the Kings of England exercised a power of moderating the Summum Jus, arising from the rigour of the Law. In Ed. I. and afterwards, this power was exercised

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cised on exprefs Petition to the King, and the Chancellor usually affifted the King.— Sometimes, in the abfence of the King, (very common for many fucceffive Reigns, during their poffeffions of Dutchies and Fiefs in France, and the Crufades in Paleftine) thefe Petitions were referred to the Chancellor alone : till at length a Jurifdiction was delegated to him. The *Bill*, it may be obferved, ftill retains the form and language of a *Petition*.

The firft Decree made by a Chancellor, is faid to have been in 1394, 17 Rich. II. but no fettled Jurifdiction was formed, till in the reign of Hen. IV. about 1399. But in thofe days fprung Feoffments to Ufes, as neceffary fruits of the troubles and fufpicions of the times, whereby the Poffeffion of the Eftate was diftinct, and divided from the Property ; then
it

it was that the Jurisdiction of this Court so greatly increased. And matters of Conscience still stand on that ground. The common division of *Fraud, Accident, and Trust*, will give a good general idea of the Jurisdiction, and excellent Institution of this Court: being in cases that involve such circumstances, as have, or ought to have, a strong operation on the conscience and intention of the Parties in Transactions; and fit to be here considered and enforced: as Courts of Law have, in general, too weak and incompetent a cognizance of them, being tied up by strict legal ideas and rules of Evidence, which will sometimes fall wide of complete Justice. Not but that Courts of Law do, in many cases, consider the intention of Parties, as in the general exposition of Wills, in all cases of Contracts, and throughout
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in the large field of Practice, where Courts of Law are invested with a discretion that amounts to the most liberal Equity. And in those cases, the Rules of Law and of Equity, are in a great measure the same: perhaps I may add, that there is but this single rule in both, to do complete Justice according to good Faith and the solid Intention of the Parties, in their mutual Transactions. But the general ground of going into Equity, (as distinguished from Law) is *the want of Remedy at Law*; as you learn from the Form of every Suitor's Bill.

I have, therefore, in this hasty account of the Sovereign Courts of *Westminster-Hall*, I hope, in the main, proved the first position I sat out with, that in every case one Court is better calculated to give a remedy than another; by which, however, I do not mean,

mean, that one Court of Law, or one Court of Equity, is in any respect preferable to another of the same kind; but that the nature of the Case, will point out, whether the Remedy is more proper at Law or in Equity.

§. 61. And I am now led to the second position, that no person can sue, or (as I would put it in the most extensive light) no person can be sued in two different Courts for the same thing. A Recovery in one Action at Law, will be for ever a Bar to a Recovery in another, brought for the same specific cause, in the same or another Court. Nobody shall proceed, on the same grounds, both at Law and in Equity: the Proceedings at Law shall be enjoined, or the Bill in Equity shall be dismissed. If the Law of England is thus careful of carrying a Civil satisfaction too far, much more

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is it, in Criminal cases, where Life or Liberty are concerned. I do not know any maxim more inviolably observed than this, *that nobody is to be twice punished for the same offence*. Here the position is much stronger enforced than in case of Civil Actions: there you shall not *recover* a Judgment; here you shall not so much as *charge* a person again, after one Trial had. An Acquittal on an Indictment, is as much a Bar to another Indictment for the same Crime, as a Conviction. And new Trials, which may bring a Civil transaction in review again, and subject the Party to pay Damages in the second instance, which he had escaped in the first; or where a second Jury may assess double the satisfaction given by the first; these, I say, are unheard of in Criminal proceedings: a Prisoner who has once had a *Verdict* passed on him,

him, can never have a second for the same Offence.

§. 62. I was aware, however, that to common apprehensions, some instances of daily practice might be set up, as exceptions, at least, to the generality of what I have advanced, if not objections to overturn it; I did, therefore, by the third position, guard it upon my entrance on this subject; by observing, that where two Courts did entertain Jurisdiction at the same time, or successively on the same transaction, it was with a very different view, and for very different purposes.

The instances of the first kind may be put into two lights: 1. Where the Proceedings are in the same Cause in two Courts at the same time. Or, 2. Where the Proceedings are in different Courts at the same time, but of a very different nature.

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The first is where one Court retains the principal Jurisdiction of the Cause, but wants the assistance of another, for a particular purpose: as, where in a Cause in Chancery, a question of Law is sent to the Judges, or an Issue to a Jury; or a Bill is filed in a Court of Equity for a Discovery, in order to bring an Action at Law.

The second kind are more numerous and more apparently in the teeth of my Doctrine; the proceedings being in different Courts, at the same instant against the same Person, and arising from one single transaction. As, where any one is sued in the Ecclesiastical Court and at Common Law; or in an Action, and at the same time prosecuted by Indictment or Information.

Now these cases, well considered, are far from exceptions to the position laid down, because they are with a
different

different design. In the first case, the Suit is *pro salute animæ*, in the Ecclesiastical Court; and at Common Law, for a *Civil Satisfaction or Fine* to the King; which surely are different ends of Proceeding. In the other case, a Civil satisfaction is as widely different from a Punishment. But the Offence itself, in both these cases, is in reality double; an offence against the Community, as well as an Individual; public Decency or public Peace being violated, at the same time a private Injury is committed. If then there are two Offences committed at the same time, Why should either go unpunished?

The objection then is groundless in itself, but it never obtained, in fact, so little as at present. A Penal Action and a Common Law Information, will not be encouraged to run on together: Courts will suspend a Judgment in
this,

this, till they know the result of that. And where even a single prosecution, tho' in a Criminal Information, involves a question of Civil right, they will rather chuse to try the Right first in a feigned Issue, than go on directly in a Criminal way. *Policrites* knows I speak of every day's experience; and, therefore cite no Authorities.

You will, however, be entirely satisfied with the cases of *successive* concurrent Jurisdiction; they being instituted to redress any supposed grievance of either Party, who has Judgment against him in a Court below, and applies to a higher Court to correct the Errors which he suggests in their Proceedings.

This universal gradation of *Appeals*, (by which I comprehend, in a large sense, every redress that can be had from one Court against the determination of another) I look upon to be

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one of the glorious characteristics of the English Constitution. The highest Court alone excepted, I do not know any one Court of Justice intrusted with final Jurisdiction. Without this reservation, you might well complain of those summary Jurisdctions, which branch out the executive part of Government into such innumerable channels, and serve the dispatch of Justice in that respect; in any other might be its Oppression. This redress from one Court to another, may be considered in two lights. 1. As to the power Superior Courts have over the Inferior. 2. As to the manner in which Proceedings of the Higher Courts themselves are to be redressed.

1. The first have a Power, 1. To forward Justice in lower Courts, having Jurisdiction; as by Mandamus to Ecclesiastical Ministerial Officers—to

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Corporations—to Trustees of charity; by Attachments to Sheriffs, and others acting as their own servants. 2. To prevent excess of Jurisdiction—as prohibitions to the Ecclesiastical Courts—Writs of Certiorari, to remove Proceedings from lower Temporal Courts: and of this kind are Injunctions from Courts of Equity. 3. To redress erroneous Proceedings in inferior Courts, where they have Jurisdiction. As by Writs of false Judgment from Manor Courts; Writs of Tolt, and others of that kind; and in many instances by Certiorari, or by Appeals from the lower Ecclesiastical Courts to the higher; from the higher to the King in Chancery, who reviews their Proceedings by his delegates, appointed under the great Seal; from Courts of Admiralty, and from the highest City Court to other Delegates; from every

Plantation Court in the British dominion to the King in Council; from the Court of King's-Bench in Ireland, to the King's-Bench in England; from inferior Courts of Equity to the Court of Chancery; from all charitable Trusts, where no Visitor is appointed, to the Court of Chancery.

The Case of *College Visitors*, whom, perhaps, you will remind me of, as standing alone without Appeal, is a single instance, it is true, but at the same time is founded on reasons that distinguish that Case from all others. All other Jurisdictions whatever, are derived from the Crown; and the Crown, by the Constitution, has in all these left a necessary reserve to itself of the final Execution of Justice. Charitable Trusts are derived only from private Property: and the Proprietor, acting consistent with the Laws

Laws of the kingdom, has as much right to model the distribution of it to all futurity, and appoint those whom he will intrust with the care of it, as he has to make a Will and appoint his Executors. And it is from the omission only of the Founder's appointment, that the Crown interferes as general Guardian in Ecclesiastical Foundations, or on the defect of Heirs to the Founder in Lay Corporations. And if the Crown, in either Case, at all interferes, where a Visitor is appointed, it is only to see whether he has Jurisdiction; never to controul him when he acts within it.

2. The higher Courts themselves are, likewise, in every Judgment or Decree they give, liable to be controuled by Writ of Error, or Appeal in Parliament. Their Practice alone is left them absolute in their own

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hands;

hands ; without which they could not proceed at all.

There is something so noble and elevated in this *last great stage of Appeal*, that it may challenge any nation to come near it : a Court consisting of persons who from their birth, their education, their estates, have the greatest opportunity of being well informed, and the least imaginable probability of being under any undue influence whatever ; who are assisted by all the Judges, whose opinions upon any question proposed, they have a right to hear ; and whose number, with all these advantages, exhibits the noblest Form of Judicature in the world.

Thus I have given you the best view I am able, in so short a time, of this large plan of Jurisdiction ; the excellence of which, I must repeat to you, consists in the great accuracy, ease, and

and dispatch, with which Justice is administered by these subdivisions of Jurisdiction; and at the same time in the security of it, in leaving none of these Jurisdictions absolute and uncontrollable: in giving not only some Appeal from every Court to another, but often in a beautiful gradation of Appeals before it reaches the last resort.

§. 63. There are, likewise, some other particulars in this general sketch of the outlines of Jurisdiction, that must not be overlooked; because they seem to distinguish our Legal Constitution much to its advantage. By this I mean to remind you of the *occasional*, as well as *standing* distribution of Justice. The latter, I fear, I have been too full in explaining; much less need be said of the other, by which I mean principally the Institution of *Circuits*; and yet this, I think, is what

distinguishes our Civil Administration from that of all other Countries. All States, antient and modern, seem to have regulated the distant parts of their Dominions, by certain residing Magistrates, whose Jurisdiction is fixed within particular districts : of which kind are the Governors of Provinces, in antient times, and of Plantations in our own and other modern European States. These, it is true, in all ages, have been under the controul of the superior Power of the State that appointed them ; and yet, History, as well as Experience, informs us, the Administration of Justice has not flowed so smooth and uninterrupted, from that very circumstance of such Magistrates being fixed without any kind of Rotation ; and particularly from their being placed at a great distance from the Center. If those who pre-
fide,

fide, are liable to influence in such circumstances; the derivative powers under them, must be so, for the same and other reasons. It is hence, I conceive, the Romans, to meet with one inconvenience, and check one species of corruption, prohibited a Judge to sit in a Province where he was born. That Policy has, perhaps, not been so well copied in our own System, by a similar prohibition of a Judge upon the Circuit, sitting in a County where he was born or inhabits. If there were any grounds for the prohibition in our System, it should have been extended. The mere accident of birth, or the stronger bias supposed to arise from bare habitation, would apply with tenfold weight against an Owner of a large estate, whether he resided or not. That case is omitted by the provision; and yet, if a man was
likely

likely to favour his neighbours, he would be much more likely to do so to his Tenants. Nay, if in Civil cases, where alone the incapacity arises, such attachments were likely to produce Corruption; much more, it may be seen, would it be in cases of Blood. This exception was accordingly, from its own principle, originally extended as well as copied; but this large prohibition, made penal by the Stat. Rich. II. both on Justices of Gaol Delivery and of Assize, was, on account of its general inconvenience, directly repealed, as to the Judge of the Crown Side, by an Act of the late King; tho' in the Act of Hen. VIII. confirming the Stat. of Rich. II. as to the prohibition of the Nisi-prius Judge, and omitting it as to Judge of the Crown Side; it did seem to be virtually repealed before. But it must be owned,
limited

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limited as the incapacity still is, its inconvenience is daily felt. Its Policy, in our System of Administration, independent of its inconvenience, may very reasonably be questioned. For a Judge, in the Roman Law, (as in most Countries now) decided both on Law and Fact: our own, on the contrary, have not only the single province of deciding the Law; but their opinion, in point of Law, can never, (we have seen) be so final and conclusive as not to be liable to be reviewed in some course of Appeal. Their independency, in point of fixed salary, and their places now fixed for life, are reasons that give an additional security for freedom in their Judgments. Their Rotation too, in this occasional administration of Justice, is something which distinguishes our legal Constitution from that of all others; as much
as

as the occasional administration itself. The Common Law (whether to secure the integrity of the Office to the Public, or to prevent the burthen of it to Individuals) has always approved of annual or temporary, rather than fixed officers. Of which kind are the Sheriffs, and all the subordinate Peace officers. Need I add, the Law had, formerly, as little idea of a Member of Parliament being fixed for more than a year, as it now has of a Parish Officer? And tho' the judicial character (as it is proper it should be) is fixed; yet, in this Form of Justice, the Public have the benefit of Rotation, if there is any. But this is a trifling circumstance, in comparison of the great advantages that redound to the Public from the exercise of this course of Justice.

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It may be difficult to say, how ancient this Institution of Circuits is: and rather than go too far back into so obscure a subject, I would enlarge a little upon its excellence. And its excellence principally consists in that exact and nice distribution of Justice, that every body may be said to have it at his own door. The Institution, perhaps, will gather reputation, if we look back for some ages, between that and the present. Instead of the Parties, with their Witnesses, and the Jurors, being obliged to travel all over the Kingdom to the King's Courts (which at that time of day were moveable) the King's Court, by the Institution of Circuits, is for a time (as it were) fixed in each County. And consider only, when roads were impassable, and so little accommodation for travelling, (as we may easily judge, by looking only

only a century back) how hard it would have been for every Suitor, to the expence of litigation, to have added this of travelling? It may be just intimated, that it was this extreme bad state of travelling, that, probably, was one original cause of the delay complained of in our Suits, by fixing the stated intervals in the return of Writs.

For a long time, however, only real actions were tried upon Circuits: the Stat. of Westminster extended the Jurisdiction of Justices of Assize, to transitory actions, where neither in point of value, nor length of time, the Examination before them was thought too great. And now this excellent provision is, as it long has been, extended to every trial of fact that must be decided by a Jury.

But

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But besides the dispatch of Justice, which Circuits are principally calculated to promote, they are the means of *diffusing* Property as well as *deciding* it. The surprising concourse brought on this occasion, from all parts of a County to the assize town, which is generally chosen as near as can be to the center, greatly contributes to the opulence of those places, by promoting Inland Trade. So that this kind of circulation, so quick for a time, may be said to produce a kind of political health to the County for the whole year. Then consider, in a nobler view, the lustre these meetings acquire from the presence of some of the principal persons in the kingdom; many of whom, after having served their Country in the highest stations in the Metropolis, now come to do it service at home.

home. Add to all this, the gaiety and diversion that commonly accompany these solemnities. Let your recollection only rekindle your fancy; then you will picture to yourself, in such a concourse, the lively images of Milton.

—————The busy hum of men;
While throngs of Knights and Barons bold,
In weeds of Peace high triumphs hold.
With store of Ladies, whose bright eyes
Rain influence—————

You will allow this is a pleasing picture of these Assemblies; and not unlike the generality, tho' the colouring may be too high for some.

§. 64. From this view then, it appears, that the Public, almost in every shape, is the better for this excellent Institution. And, because I am going to say a few words on the analogy
many

many of the parts of our Administration bear to the whole; the subject we are now upon, points out one remarkable similitude between the *Ecclesiastical* and *Civil Polity* of this Country. The Visitations of the Clergy by the Bishops in their respective Dioceses, bearing no inconsiderable resemblance to the Institution of Circuits; as their Convocation, composed of the King as their head, an upper house of Spiritual Lords, and a lower of the Commons, does to the Parliament. So true is it, as Sir H. Spelman has somewhere observed of our Government, "that each side of the Arch descendeth alike."

The analogy, however, that subsists between the parts of Civil Government, compared with the whole, is much more remarkable than that between the Ecclesiastical and Civil

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Powers.

Powers. Not to be tedious, I shall instance this only in two particulars ; our *Civil Corporations*, and our *Colonies* abroad.

Corporations may be said (like the Constitution of which they are a part, and the Government to which they are subordinate) to contain a Monarchical, Aristocratical, and Popular Power ; the Mayor, Aldermen, and Commonality, or whatever other terms distinguish the person presiding, from those over whom he presides in a Corporation, with their gradations of Power, resembling the King, Lords, and Commons in the Constitution.

And in our Colonies in general, the Governor, his Council, and the Assembly, have the same analogy and resemblance. Both Corporations and Colonies conform likewise to their great archetype in this ; that they are
both

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both governed by some kind of Charters or written Laws, the construction of which is derived from established usage or Common Law.

The Origin of Government, however, in both these, differs from that, tho' the Form, as to the delegation and distribution of Power, substantially agrees; the supreme Magistrate, as well as the other internal parts of the Community, being elective both in Corporations and our Colonies; tho' hereditary in the Constitution: the Constitution, I need not add, gains greatly, indeed, by the comparison. The resemblance I have ventured to point out in both, must be understood to be, in general only, not absolute and universal. For on the one hand, in many Corporations, the distribution of power is anomalous; and, on the other hand, our Colonies, taken all

together, may be said, in their turn, to exhibit every form of Government. The divisions of them into Regal, Proprietary, and Charter Governments, corresponding, in effect, to those of a limited or absolute Monarchy, and a Republic. But as what has been said applies principally to the *Regal* Government, of which the greatest number consists, so far the conformity does obtain. And as far as it does, they are beautiful instances of political structure; simple, uniform and harmonious: like those several Planets in our System, each performing motions in its own orbit, while, at the same time, in its revolution round the Sun, it is admirably subservient to the interest of the whole. And our Colonies, one would hope, must be convinced, (as experience in the end will certainly teach them, whenever they attempt the contrary) that they
give

give up their happiness whenever they quit their dependence ; and like the Planets, must at once lose their light, heat, and activity, when their motions cease to be at all regulated by the Center of their System.

§. 65. Perhaps it would be an omission in this draught of Jurisdiction, if I did not mention the intercourse between our own and other nations, for the mutual execution of Justice. As Commerce has so variously connected the interests of mankind with each other, however separated by distance of place, or political district ; any Nation, our own in particular, considering the extent of its negotiations, would be much wanting in its administration of Government, if it made no provision to protect the Rights, and redress the Injuries of *Foreigners*.

Every Government, I take it, has a Right for its own Preservation, to prescribe, by settled Laws, how far it will admit the intermixture of Foreigners; and what Civil Rights it will invest them with. On the contrary, every Government, for the same reason, has a right to prescribe, How far it will permit the absence of its own Members, in Foreign parts; under what Restrictions; and to punish those Members who desert its Service, at the time their own Country stands in need of it.

As to the first, the Law of England is sufficiently favourable to Aliens for the purpose of a mercantile residence. It endows them with the full right to personal Property; and protects them in the enjoyment and disposal of it, as much as it does its own Subjects. Protection and Allegiance, are in all cases

cases reciprocal : and therefore, those who for certain purposes acquire a Protection for their persons and their effects, must, in certain respects, have a local, limited, and partial allegiance to the State where they reside : tho' their natural Allegiance to their own Country remains for ever firm and indelible. Natural Allegiance, and the Defence of our Country, being (the same as Tully has said of Self-Defence) *non scripta sed nata Lex : quam non didicimus, accepimus legimus ; verum ex Naturâ ipsâ arripuimus, hausimus, expressimus.* As far then as the purposes of Residence require, Aliens are considered as subjects, and alike responsible for their conduct. They cannot be considered as Subjects, to acquire or derive to others permanent real property, or to fill places of trust : because this requires a stricter Allegiance and closer

ties to this Country, than they can observe, either for the purpose of their Residence, or consistent with their native Allegiance elsewhere. It is pleasant to observe, how the Law of England breathed his liberal spirit to Foreigners, even while Trade was little more than in its Infancy. There is no occasion to cite a passage in Magna Charta, to which I allude.

§. 66. It is full as necessary for the preservation of any Society, that it should have a power to regulate the absence of its own Members. Few instances, indeed, occur, which make it necessary for this power to be put in execution ; but it would be bad Politics, as well as bad Logic, to argue from the want of exercise, to the want of existence of such a Power.

Any person may, if he pleases, quit his native Country for ever : but then
he

he must give up his Rights, at the time he withdraws his Subjection. Because, if the Society should have occasion for his service, (of which the Society itself is the judge) it will not be at his option to choose whether he will assist it or not; to continue abroad, and at the same time to expect, that those at home shall exert themselves in preservation of his Rights.

If he, upon notice, refuses his assistance, the Society may punish his disobedience, by confiscating his Property. And what the Society may do to enforce his attendance in necessary cases of Defence; it may do, on stronger reasons, to enforce a Member to appear who absconds from Justice; or it may imply his guilt from his flight, and seize his effects to make restitution to the State for his criminal conduct.

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This power over its own Members, I take to be inherent in all Societies. The Law of England, we shall see, applies this doctrine to its own Subjects. It is on this ground that the Constitution enables the King to restrain his Subjects, in certain cases, by Writ, from departing the Kingdom; to outlaw, or deprive of all Civil Rights, those who fly from Justice; and to prohibit, under necessary Restrictions and Penalties, those who, induced by imaginary prospects of gain, can so far forget their own Country, as to enter into Foreign service, and export, as far as their abilities reach, the Arts and Manufactures of this Country to rival nations.

Thus, *Philander*, tho' your Country did not stop you from your travels, you see it might have done it, upon immediate occasion of your service:
you,

you, I am sure, will repay your Country for this Indulgence, by the greater service your experience in Foreign parts, joined to the knowledge you will acquire of affairs at Home, will enable you to perform.

§. 67. It yet remains behind to mention, whether the Laws as well as the Subjects of other Countries, do at all fall under the consideration of our Courts.

In many cases, where questions arise between Foreigners and our own People, the Courts here will take cognizance of the Laws of other Countries, properly attested. And I do not suppose, especially where Foreign Laws were the grounds of the Contracts, that this was ever refused. But it well admits of a doubt, if English subjects, residing in Foreign countries, do make Contracts abroad, which being contrary
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to the positive Law of this Realm, could be aided by no Court of Justice, if made here, whether our Courts will give them any sanction, merely because the contract was not contrary to the Law of that place abroad, where the Parties resided at the time of making it. It was, indeed, made a question, in a still more unfavourable light, whether a contract made abroad, contrary, both to our own Law, and the Law of the Country where it was made, could be aided by our Courts of Justice? The case, in which this point arose, was determined upon far other grounds: the point itself, I believe, was never determined; tho' a frequent and alarming practice in a similar instance, as to the general proposition, but pregnant with many severer consequences, bids fair for making

this question once more engage the attention of the Public.

For the same reason, founded on the noble ends of Justice, that our Courts will support Foreign contracts, will they give credit to the Proceedings of Foreign Courts, properly attested, and having compleat Jurisdiction.

Indeed, Justice could never be done in any one Country, unless there was that universal good correspondence of one Country with another, in support of it.

And the reasons that may be urged for aiding Justice in Civil cases, hold infinitely stronger when applied to Criminal. The interests of Society itself, in general, are so deeply involved in this respect, that it can never be the real interest of one Country to nourish an impious Criminal in its bosom,

bosom, who flies there for refuge against the Justice of his own. And I scarce understand Lord Coke's doctrine on this point,—“ that Foreign kingdoms, even in league with one another, are Sanctuaries for any subjects flying from one another.” How has he supported it? He says, “ it is holden, and so it hath been resolved;” but he neither tells us *when*, nor *where* it was resolved. His examples from History, are far from proving the point. The first, from Q. Eliz. time, shews good political reasons, why her demands were not complied with; because she had before done what she complained of. That from Hen. VIII. proves nothing: and that about Pool the Earl of Suffolk, being delivered by the Court of Spain, proves (if any thing) the point I am contending for,

and consequently is in the teeth of Lord Coke's own assertion.

Possibly there may be instances, from History, in support of his assertion, even in later times, when the Law of nations and Government was better understood, or more strictly canvassed. Bishop Burnet, I remember, relates his own case, which is, in point of Fact, agreeable to Lord Coke's assertion.

But the assertion itself, seems directly against the Law of Nations; by which Societies are so far from having a power of injuring each other, that they ought, as Individuals ought in a state of nature, to give all mutual assistance and protection, consistent with their own preservation.

But History, tho' it will not make the Law in this respect, is too apt to encourage the practice by recording the
Facts :

Facts : and these imaginary interests of nations, often disguised under the specious name of Reasons of State, are too apt to prevail against the real Interests, ever founded on solid Justice.

Nor have the methods taken to guard against abuses of this kind, always been more defensible than the abuse itself. One way has been to seize the party privately, and convey him to his own Country. Another, to prevent protections of Foreign States in amity, by express clauses in a Treaty. I shall only observe, upon these two Methods, that the latter, tho' the only just one, is a prudent rather than a necessary precaution : as such a clause in a Treaty, only operates as a recognition, not a creation of Right. For if, from the very nature of Society, Subjects are answerable to their own nation for their criminal conduct ; by the Law of
nations,

nations, they may be justly demanded of Foreign States to which they fly : and the refusal of delivering them up, is a just cause of War.

But on the other hand, if a Criminal flies from his own to another State, for refuge ; his own cannot seize him there by violence. The case, in this respect, is much the same as (though stronger than) that of pursuing an enemy's ship under the protection of a neutral Port. In both cases you are first to apply to the Justice of the Country, if that is refused, you may resort to war at your option.

Thus it is that all nations are bound to assist each other in promoting the ends of Justice : they have their reward in doing so, by carrying on, at the same time, the end of their own preservation. Our Constitution has made sufficient provision for doing it ;

and cannot be complained of on this account.

§. 68. Thus have I run over all that occurs to me upon this subject of the *English Constitution*. I am thoroughly persuaded of the imperfection of this sketch, by way of doing Justice to the subject; yet, I am inclined to think, enough has been said in the course of our conversation, to excuse me from the imputation of any intemperance in such frequent encomiums on its excellence. Tho' fired with such a theme, had I fallen into excess, I would own it with pleasure, (as *Tully* did in speaking of *Plato*) *admiratione quadam commotus sæpius fortasse laudo quam necesse est.*

I hope it has all along been understood, (for I have taken it for granted) that the essential frame and structure of the Constitution is a
thing

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thing independent of the actual exercise of Government. As different as the execution of a Law from the Law itself : or the conduct of any particular men from the abstract nature of Morality. Nobody would judge of the excellence of any rule, from the accidental observance or neglect of it. It is sufficient that the Constitution, in its own nature, is best adapted to promote the happiness of Society : that its freedom and restraints are so admirably poized, that as little as possible, of natural Liberty, is given up ; at the same time that the good of Society is, as much as possible, secured.

But tho' the actual exercise of Government is, at all times, quite another consideration from that of the original frame of it ; yet, the excellence of our own form of Government, is remarkable even here : that in cases where the

Administration has actually overstrained the Constitution, there is something in the spirit of the People so admirably suited to the Constitution; that the remedies have commonly followed the distemper; and the Constitution, in the end, has been restored, tho' not in every case without the most violent convulsions. But, however, a torrent has of a sudden swelled the stream, and threatened to overflow the Country; it has, at length, sunk within its proper channel, and run smoothly on in its course.

§. 69. I shall not scruple to add, that in this growth (as it were) of the Constitution to maturity, through so many ages, time has furnished it with many real and solid acquisitions. This would be fully evident by considering the gradual improvements in each successive reign. A subject so copious is
entirely

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entirely out of our present reach; it would besides require a masterly hand to make it interesting without being tedious. Lord Hale (as far as his subject would permit him) has shewed the way, and I do not despair of its being one day executed in a more extended plan.

But, the most general recollection, without any regard to dates or precision, will serve to remind us of the comparatively greater happiness we enjoy under this Constitution, than what our early Ancestors did. Freedom was always of its very essence; but its freedom has been improved. Nay, even many political storms themselves, besides recommending the succeeding calm, have been followed with a much greater serenity, than ever preceded them.

Think ever so little of the miseries formerly occasioned by the unsettled

succession of the Crown; the struggles between the Crown, and the Church; the Pope siding with either, as either had power to dispute or defend his usurpations. In the mean time, what was the political degradation of the Kingdom in those days, when it was alternately subject to *Dispensations* or *Interdicts* from the See of Rome? Think how these constantly tended to ripen seeds of Rebellion, when assisted by the excessive power of the Barons, and the frequent absence of the King in Foreign dominions; at a time too, when every great Baron had his Castle, which, according to his own caprice, he would convert into a Garrison, either for or against the Crown? Think too of the provisions made for the security of our property and persons in Magna Charta, Habeas Corpus Act, and the Bill of

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Rights; of the abolition of the Forest Laws, and of the rigours of the Feudal System. For tho' this System in its original was undoubtedly founded on the best principles of human nature, those of *generosity and gratitude*; yet, pursued through all its consequences, time has sufficiently shewed us, that it by no means suited the genius of a free and commercial Country.

Think too, when with such pains the purity of Religion was restored by the *Reformation*, of the care that has been since taken to preserve the freedom of it, by the *Test and Toleration Acts*: that on the one hand, an Indulgence might be given to the scruples of men in points of worship, that do not interfere with the subordination of Government: on the other, that as far as the exercise of Government is concerned, the profession of the established

Religion should be the necessary terms of an admission to the share of the Government.

Think too, of the much greater impartiality in the manner of administering Justice at this time than formerly; and the additional advantage, to the Public, of the seat on the Bench being fixed for life. Think of the pains that have been taken to preserve a disinterested choice of Members of Parliament, and their free conduct in it. That these provisions, in the first case, have been wanting in their effect, is to be attributed, perhaps, more to a relaxed execution of Laws, than a defect in the frame of them. That might be the case of any future provisions of this kind. Think too of the free manner of passing Laws; the Crown and Parliament both open to Petition—the free course of Laws when passed; no *Non obstante's*, or Dispensations; no Money levied

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on the Public but by Law ; no exactions under the specious titles of Loans and Benevolences ; no Oppression of the Subject by Purveyances, and other arbitrary pretensions of Prerogative.

I might add, the further security we have for the internal tranquility of our Country, by all parts of the Island, and of the Dominions of the Crown, being brought under a more regular subordination, by the Settlement of Ireland and Wales, and the Union with Scotland. Much might be said too, on the great improvements in the face of this Country, by the establishing of Posts, and opening universal channels of communication, by the making of Roads and Rivers ; and of the infinite resources Trade has acquired from the connection with the Colonies. — But these are endless topics ; and had I not already given the fullest exercise

exercise of your patience, the time of day would release us from such a wide range of disputation

§. 70. I shall hasten, therefore, to a conclusion: and after all we have said, does it seem too much to assert, that, every thing fairly considered, the English Constitution may stand the most rigid tests of History and Experience, to have its excellence justly weighed; and that it may be compared with those of any Age or Country?—That it wants few of those improvements, which the boasted plans of perfect Commonwealths, those idle dreams of mere speculative Politicians, have obtruded on the world; often without knowing the real nature and genius of their own?—And that it is not affected (if the whole is taken together) by those little strokes of Satire in the celebrated

lebrated draughts of fancy, in *Utopia*, *Atalantis* or *Hounhým* Land?

And as far as it is in the power of good Laws, in aid of the Constitution, to make good Subjects, we are happy above all others. It has, indeed, been well observed by Tacitus, *corruptissima Respublica, plurimæ leges*. But I would consider the multiplicity of our Laws in a more amiable light; not so much as the consequence of Corruption, as of a jealous regard to Liberty. Our Constitution, by particularly defining every thing by Law, leaves us free in every case where the Law does not oblige: and, therefore, the Law, to reach all cases, and not be arbitrary by construction, must, in its nature, be voluminous.

But a number of Laws, if they are Evidence of Corruption, are made, at the same time, to check its progress, and

and to secure us from its effects. I know, in confirmation of Tacitus, it is a settled observation, (Aristotle made it of *Greece*, Sallust afterwards did of *Rome*, and the Fact still is so in *America*) that Infant States are governed by *Manners* rather than *Laws*. But this will scarce ever be the case of Societies in a more advanced age. The truth is, the very temptation to Crimes, scarce exists in the infancy of Society. The weeds grow up with the fruit: the more modes of property increase, will likewise the modes of violating property gain ground. Not but that *public manners* must always, in some measure, correspond with *Laws*; or Vice will, with ease, be too strong for its Chains. The very riches of a State do, in their own consequence, introduce Vice; which is one reason, we are told, why many antient States
were

were averſe to Commerce; becauſe Commerce, by importing Foreign luxuries, tends to ſet the Manners of the People in *Oppoſition* to the Laws, and by degrees produces a ſpirit of Licentiousneſs that is *above* them.

But the inference againſt the riches of a Kingdom, or the toleration of Commerce, becauſe it may multiply Vice, is as idle, as contending that Vice itſelf ſhould be tolerated in Society, becauſe private Vices are, in many ſhapes, productive of public Riches: which is a maxim ſo deſtitute of ſolid reflection, that it has not probability enough for a *Fable*. In both caſes, the remedy is apparently to be had from other quarters. Public riches may be promoted without the aſſiſtance of Vice; and Vice, tho' it may be introduced by Commerce, may be reſtrained

strained by other means than the restraint of Commerce itself.

§. 71. I know of no way more effectual to restrain it, than by good education of Children, and good examples of Parents. Let every one, in his own house, have a kind of *Persian School of Justice*. Let the foundations be laid early for making a *good Man*, and a *good Christian*; and they will, in due time, form the most perfect character in this world, (as comprehending those of the other two, by enlarging the sphere of Virtue to its utmost) in compleating that of a *good Citizen*. Then the Laws will have the best effect, that can even be wished for in theory, that of *being a Rule in all cases, rather than a Restraint in a few*.

§. 72. Nothing more passed, material, on this subject; and with it the
con-

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conversation closed : for as the showers, which are usual at this time of the year, had served to lengthen the conversation this morning, by keeping the company within doors ; and the sky began to clear, *Eunomus* proposed a walk before dinner, which was readily agreed to by *Policrites* and *Philander*.

END of DIALOGUE III.

C O N-